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English Ruling Cases

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ARRANGED, ANNOTATED AND EDITED

BY

ROBERT CAMPBELL, M. A.

OF LINCOLN'S INN

ASSISTED BY OTHER MEMBERS OF THE BAR

WITH AMERICAN NOTES

BY

IRVING BROWNE

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VOL IX.

DEFAMATION—DRAMATIC AND MUSICAL COPYRIGHT

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ROCHESTER, N. Y.

THE LAWYERS CO-OPERATIVE PUBLISHING CO.

1916

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RULING CASES.

DEFAMATION (LIBEL AND SLANDER).

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SECTION I. — *Distinction between Libel and Slander.*

NO. 1. — THORLEY *v.* LORD KERRY.

(C. P. IN ERROR FROM K. B. 1812.)

RULE.

AN action may be maintained for words written, for which an action could not be maintained if they were merely spoken.

Thorley v. Lord Kerry.

4 Taunton, 355-366 (s. c. 13 R. R. 626).

Defamation. — Libel. — Slander.

Written words tending to vilify a man and bring him into hatred, [355] contempt and ridicule, are libellous, although the same words would not be actionable if they had been merely spoken.

This was a writ of error brought to reverse a judgment of the Court of King's Bench. The plaintiff below declared that he was a good, true, honest, just, and faithful subject of the realm, and as such had always behaved, and considered himself, and until

the committing of the several grievances by the defendant therein-after mentioned, was always reputed, esteemed, and accepted by and amongst all his neighbours, and other good and worthy subjects of this realm, to whom he was in anywise known, to be a person of good name, fame, and credit, to wit, in the parish of Petersham in the county of Surry, and also that he had not ever been guilty, or until the time, &c., been suspected of the offences and misconduct thereafter mentioned to have been charged upon and imputed to him; or of any such offences or misconduct, by means of which premises he had before the committing of the several grievances deservedly obtained the good opinion and credit of all his neighbours, and other good and worthy subjects of this realm, to whom he was known, to wit, at Petersham: and also, that before and at the time of the committing of the grievances by the defendant below as thereafter mentioned, the plaintiff below was tenant to the Right Hon. Archibald Lord Douglas of a messuage and premises, with the appurtenances, situate in the parish of Petersham, and he being desirous and intending to become a parishioner of the same parish, and to qualify himself to attend the vestry of and for such parish, as such parishioner, agreed with Lord Douglas to pay the taxes of and for the said house, which he so inhabited as tenant to Lord Douglas, and also that before

and at the time of the committing of the grievances by the [* 356] defendant below in the 1st count * mentioned, the defendant

below was the churchwarden of and for the parish of Petersham, and the plaintiff below, so being desirous and intending to attend such vestry of such parish as such parishioner, had thereupon, by his certain note in writing, given notice to the defendant below of his agreement with Lord Douglas, yet the defendant below, well knowing the premises, but greatly envying the happy state and condition of the plaintiff below, and contriving, and wickedly and maliciously intending to injure him in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbours, and other good and worthy subjects of this kingdom and to cause it to be suspected and believed by those neighbours and subjects, that he had been, and was guilty of the offences and misconduct therein-after mentioned to have been charged upon and imputed to him, and to vex, harass, and oppress him, at Petersham aforesaid, falsely, wickedly, and maliciously did compose and publish, and

No. 1. — *Thorley v. Lord Kerry*, 4 Taunt. 356, 357.

cause and procure to be published of and concerning him, and concerning such agreement with Lord Douglas, and concerning the said note in writing, a certain false, scandalous, malicious, and defamatory libel in the form of a letter to the plaintiff below, containing, amongst other things, the false, scandalous, malicious, and defamatory and libellous matter following (accompanied with the following amongst other innuendoes), that is to say, "My Lord, I conceive, as churchwarden (meaning as churchwarden of the parish of Petersham), I have 'nothing to say to any private agreement with Lord Douglas and yourself; your note (meaning the note sent to the defendant below by the plaintiff below), and the manner it was conveyed to me, shows your lordship still possesses that perturbed spirit which I had hoped for your own sake, after the composition and publishing of the scurrilous address of the 26th August, * would have been at rest. I [* 357] had before read the virulent, disrespectful, and ungentle-maulike letters to the Rev. Mr. Marsham; I sincerely pity the man (meaning the plaintiff below) that can so far forget what is due, not only to himself, but to others, who, under the cloak of religious and spiritual reform, hypocritically, and with the grossest impurity, deals out his malice, uncharitableness, and falsehoods. N. B. It was my intention never to have held or had communication with a writer of anonymous letters, (meaning that the plaintiff below, was a writer of anonymous letters), but it appears I cannot now avoid it" (thereby meaning that the plaintiff below had been and was guilty of hypocrisy and dishonourable conduct). There were other counts setting out parts only of the same letter: and the plaintiff below concluded by averring that by means of the committing of the grievances by the defendant below, the plaintiff below had been and was greatly injured in his good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbours and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects, to whom the innocence, candour, truth, integrity, reverence and respect of the religion of the plaintiff below was unknown, had, on occasion of the committing of the said several grievances by the defendant below, from thence hitherto suspected and believed, and still did suspect and believe the plaintiff below to have been guilty of the offences and improper conduct imputed to him as aforesaid, and to have been, and still to be guilty of hypocrisy,

malice, uncharitableness, and falsehood; and had, by reason of the committing of the several grievances by the defendant below, from thence hitherto, and still did refuse to have any acquaintance, intercourse, or discourse with the plaintiff below, as they were before used and accustomed to have, and otherwise would have had. And the plaintiff below had been and was by [* 358] means of the premises * otherwise greatly injured, to wit, in the parish of Petersham, to his damage of £2000. Upon not guilty pleaded, the cause was tried at the Surry spring assizes, 1809, when the writing of the letter by the defendant was proved, and that he delivered it unsealed to a servant to carry, who opened and read it: a verdict was found for the plaintiff with £20 damages, and judgment passed for the plaintiff without argument in the Court below. The plaintiff in error assigned the general errors.

Barnewall for the plaintiff, in error, in Trinity term, 1811, argued, that there were no words in this case, for which, if spoken, the action would be maintainable, and he denied that that there was any solid ground, either in authority or principle, for the distinction supposed to have prevailed in some cases, that certain words are actionable when written, which are not actionable when spoken. He contended that all actionable words were reducible to three classes: 1. where they impute a punishable crime; 2. where they impute an infectious disorder; 3. where they tend to injure a person in his office, trade, or profession, or tend to his disherison, or produce special pecuniary damages. 1 Ro. Ab., *Action sur case par paroles, passim*; Co. Dig., *Action upon the Case for Defamation, passim*. And these words do not come within either of those classes. Neither of those books recognize the distinction between written and unwritten slander. All the older cases treat them on the same footing. *Brook v. Watson*, Cro. El. 403. "He is a false knave and keepeth a false debt-book, for he chargeth me with the receipt of a piece of velvet, which is false." The words were held not to be actionable, and no such distinction was there taken. So, *Boughton v. Bishop of Coventry and Lichfield*, Anderson, 119. The words, "he is a vermin in the commonwealth, a false and corrupt man, an hypocrite in the church of God, a [* 359] false brother amongst us," were held not actionable. * There is also a material distinction which has been overlooked in all the cases, between those words which, tending to irritate

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and vilify, are indictable because they conduce to a breach of the peace, and those which are of themselves actionable, the latter class being by no means so extensive as the former. Comyn, in his Dig., Libel, A. 3, when he cites Fitzgibb. 121, 253, that it is a libel if he publishes in writing, though in words not actionable, is considering this matter wholly in a criminal point of view. The last-mentioned distinction must necessarily exist, because the ground of action is the amount of the civil injury sustained by the plaintiff, not the immorality of the act of the defendant. In the case of *King v. Lake*, indeed, Hardr. 470, which was an action for words in an answer to a petition preferred by the plaintiff to the House of Commons against the defendant, HALE, C. B., held, that although general words spoken once, without writing or publishing them, would not be actionable, yet there, they being writ and published, which contains more malice than if they had been once spoken, they were actionable. And the Court being all of that opinion, judgment was given *pro querente nisi causa*, &c. But in that case, this ground was unnecessary to support the decision, for the words imputed violence, seditious language, illegal assertions, ineptitudes, imperfections, gross ignorances, absurdities, and solecisms, and were laid to be spoken to the plaintiff's damage in his good name and credit and profession as a barrister-at-law. And in 2 Vent. 28, another action was brought within five years after, between the same parties for a letter written by the same defendant to the Countess of Lincoln, damnifying the plaintiff in his profession of a barrister: but although VAUGHAN, C. J., contrary to WYLD, TYRRELL, and ARCHER, JJ., held that the action lay not, the Court did not at all advert to the distinction between written and unwritten slander, in support of their judgment. *The distinction was indeed noticed in *Harman* [*360] v. *Delany*, Fitzg. 254, but the same case is reported by Strange, Vol. II., 898, who was of counsel in the cause, and who puts it merely on the ground of its being spoken of the plaintiff in his profession. In *Onslow v. Horne*, 3 Wils. 186, it is held that even words imputing a crime are not actionable unless the punishment be infamous. *Savile v. Jardine*, 2 H. Bl. 531 (3 R. R. 502), it was held that the word "swindler" when spoken was not actionable, and the distinction was there, indeed, assumed, and the case is thereupon argued to be reconcilable with *J. Anson v. Stuart* (*post*,

p. 98), 1 T. R. 748 (1 R. R. 392), where the same word written was held actionable; but in the latter case is an *innuendo*, that the defendant intended an obtaining money under false pretences, which incurs an infamous punishment, and is therefore clearly actionable, without recurring to the support of this disputed distinction. In the precedents in *Rast.* 12, 13, *Robins. Ent.* 72, the words are not stated as a libel: it seems the distinction was unknown. In *Crop v. Tilney*, 3 Salk. 226, the words were certainly seditious, if not treasonable. The reason assigned, that the printing or writing indicates a greater degree of malice than mere speaking, is a bad one; for it is not the object of an action at law to punish moral turpitude, but to compensate a civil injury: the compensation must be proportionate to the measure of the damage sustained; but it cannot be said that publication of written slander is in all cases attended with a greater damage than spoken slander, for if a defendant speaks words to an hundred persons assembled, he disseminates the slander and increases the damage an hundredfold as much as if he only wrote it in a letter to one.

Dampier, in affirmance of the judgment. This action is maintainable, first, because the plaintiff is a peer of the [* 361] realm: and many things are actionable when spoken *of a peer, which are not actionable if spoken of a private person; as in the *Marquis of Dorchester's case*, Mich. 24 Car. II. B. R., Bull. N. P. 4. "He is no more to be valued than that dog that lies there." So in the case of the *Earl of Peterborough v. Stanton*, *ibid.* "The Earl of Peterborough is of no esteem in this country; no man of reputation has any esteem for him; no man will trust him for two-pence; no man values him in the country: I value him no more than the dirt under my feet." It does not appear that either of these was an action of *scandalum magnatum*. The case of the *Earl of Peterborough v. Williams*, Comb. 43, 2 Sho. 505, is indeed there said to be *scandalum magnatum*. The principle on which actions may be sustained for words is rather narrowly laid down in the argument for the plaintiff in error, when the causes of action are said to be only crime, pecuniary damage, and infectious disease. The gist of the last is that the imputation deprives the plaintiff of society. But what can more deprive a man of society than this imputation of being one who, under the cloak of religion and spiritual reform, hypocritically and with the grossest impurity deals out his malice, unchar-

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itableness, and falsehoods" ? If this is not a leprosy of the mind as much to be shunned as that of the body, the loss of society is not much to be regretted. If *Lake's* case had gone upon his loss as a barrister, there would have been no room for all the discussion that took place; and especially *HALE's* judgment, taking the distinction between speaking and writing. [*HEATH, J.* It appears by *Skyn.* 124, that the judgment in the case of *King v. Lake* was affirmed in error.] *Austin v. Culpepper*, S. C. 2 Sho. 313. The same distinction is taken in *Shower*, 314, though it is not taken in *Skynner*, where the libel imputed perjury, and was therefore clearly actionable. 1 Ford, MS. 49, the case of *Harman v. Delany* is reported more fully than in the printed report; and it is there * said that it was so agreed by the Court. [* 362] *Bradley v. Methuen*, 2 Ford, 78 & 9. It there appears that Lord *HARDWICKE* recognized the distinction, though it was not absolutely necessary to the judgment, which there passed for the plaintiff. There is another principle upon which the action for slander is to be maintained beyond that of penalty and punishment, viz., of disgrace and discredit; and whether that be produced by writing, or by words, if it is punishable by indictment as tending to a breach of the peace, it is also the subject of a civil action, which may be brought to recover a compensation, for the injury the plaintiff sustains by being deprived of society, as for a temporal damage. *Villars v. Monsey*, 2 Wils. 403. *BATHURST, J.*, held that writing and publishing anything of a man that renders him ridiculous, is a libel, and actionable; and fully recognized the distinction between written and spoken slander. This case continues the chain from the time of *HALE, C. B.*, 1670, to the time of *WILMOTT, C. J.*, within living memory. *Bell v. Stone*, 1 Bos. & P. 331 (4 R. R. 820). The Court, in the absence of *EYRE, C. J.*, clearly held that written words of contumely were actionable. [*MACDONALD, C. B.* "Villain" was the word there.] This brings us down to *Kaye v. Bayley*,¹ where the amount of damages made the question of importance, and it was thrice fully argued. If this series of 150 years decisions (and it was a very learned person, *Le Blanc*, then Sergeant, who refused to argue the point in *Bell v. Stone*) will not suffice to warrant the opinion that an action will lie in such case, there is no reliance to be placed on authority.

¹ One of the parties in that case having died pending the writ of error, no judgment ever was given.

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If words imputing a dereliction of every duty of imperfect obligation cannot be made the subject of an action, the law of libel very imperfectly guards society.

[* 363] *Barnewall in reply. The Court will not be disposed to extend the principle laid down in all the books, limiting the cases in which words are actionable. In 1 Ro. Ab., Case for Slander, and Co. Dig., Action on the Case for Defamation, the written and spoken slander are treated of under one title; and in the older entries there is no difference made in the declarations between written and unwritten slander, except using the word "spoken" instead of "written." In *Villars v. Monsey* the words imputed an infectious disorder. In *Harman v. Delany* the words were spoken of the plaintiff in his trade as a gunsmith. DE GREY, C. J., in Wils. 187, says that to impute to any man the mere defect or want of moral virtue, moral duties, or obligations which render a man obnoxious to mankind, is not actionable. The case in *Anderson* is in point, that the words here used are not actionable. The injury consists in the evil done to the plaintiff in the minds of others; and if the words, when spoken, be not an injury, they cannot be when written. To hold otherwise would be to make the immorality, and not the damage, the ground of action.

Curr. adv. vult.

MANSFIELD, C. J., on this day delivered the opinion of the Court.

This is a writ of error, brought to reverse a judgment of the Court of King's Bench, in which there was no argument. It was an action on a libel published in a letter which the bearer of the letter happened to open. The declaration has certainly some very curious recitals. It recites that the plaintiff was tenant to Archibald Lord Douglas of a messuage in Petersham; that being desirous to become a parishioner and to attend the vestry, he agreed to pay the taxes of the said house; that the plaintiff in error was churchwarden, and that the defendant in error gave him notice of his agreement with Lord Douglas; and that the

[* 364] plaintiff in error, intending *to have it believed that the said earl was guilty of the offences and misconducts thereafter mentioned (offences there are none, misconduct there may be), wrote the letter to the said earl which is set forth in the pleadings. There is no doubt that this was a libel, for which the

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plaintiff in error might have been indicted and punished; because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies; and I should have thought that the peace and 'good name of individuals was sufficiently guarded by the terror of this criminal proceeding in such cases. The words, if merely spoken, would not be of themselves sufficient to support an action. But the question now is, whether an action will lie for these words so written, notwithstanding that such an action would not lie for them if spoken; and I am very sorry it was not discussed in the Court of King's Bench, that we might have had the opinion of all the twelve Judges on the point, whether there be any distinction as to the right of action between written and parol scandal, for myself, after having heard it extremely well argued, and especially, in this case, by Mr. Barnewall, I cannot, upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action. For the plaintiff in error it has been truly urged, that in the old books and abridgments no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as Charles the Second's time, and the difference has been recognized by the Courts for at least a century back. It does not appear to me that the rights of parties to a good character are insufficiently defended by the criminal remedies which the law gives, and the law gives a very ample field for retribution by action for * words spoken in the cases of [* 365] special damage, of words spoken of a man in his trade or profession, of a man in office, of a magistrate or officer; for all these an action lies. But for mere general abuse spoken no action lies. In the arguments both of the judges and counsel, in almost all the cases in which the question has been, whether what is contained in a writing is the subject of an action or not, it has been considered whether the words, if spoken, would maintain an action. It is curious that they have also adverted to the question, whether it tends to produce a breach of the peace: but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shows more deliberate malignity; but the same answer suffices, that the action is not main-

tainable upon the ground of the malignity, but for the damage sustained. So it is argued that written scandal is more generally diffused than words spoken, and is therefore actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter. It is true that a newspaper may be very generally read, but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal; but that distinction has been established by some of the greatest names known to the law, Lord HARDWICKE, HALE, I believe, HOLT, C. J., and others. Lord HARDWICKE, C. J., especially, has laid it down that an action for a libel may be brought on words written, when the words, if spoken, would not sustain it. Co. Dig. tit. Libel, referring to the case in Fitzg. 122, 253, says, there is a distinction between written and spoken scandal, by his putting it down there as he does, as being the law, without mak-

ing any query or doubt upon it, we are led to suppose that [* 366] he was of the same opinion. I do not now recapitulate the cases; but we cannot, in opposition to them, venture to lay down at this day, that no action can be maintained for any words written, for which an action could not be maintained if they were spoken: upon these grounds we think the judgment of the Court of King's Bench must be affirmed. The purpose of this action is to recover a compensation for some damage supposed to be sustained by the plaintiff by reason of the libel. The tendency of the libel to provoke a breach of the peace, or the degree of malignity which actuates the writer, has nothing to do with the question. If the matter were for the first time to be decided at this day, I should have no hesitation in saying that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken.

Judgment affirmed.

ENGLISH NOTES.

In addition to the fact that libel is more permanent than slander, and that libel is also a criminal offence, the chief difference between the two species of defamation is that slander, as a rule, requires proof of special damage, whereas libel does not. See Damages, 8 R. C. p. 382, *et seq.*

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Some slanders are however actionable *per se*, that is, without proof of special damage. For instance, accusing a person of a criminal offence is actionable *per se*. The offence imputed must be one which is punishable with imprisonment and not merely with fine. It is not further necessary that the offence should be indictable. It may be capable of being dealt with in a Court of Summary Jurisdiction. *Webb v. Bearan* (1883), 11 Q. B. D. 609, 52 L. J. Q. B. 544, 49 L. T. 201.

Charging a person with the commission of forgery, *Baal v. Baggerley* (1632), Cro. Car. 326; *Jones v. Herne* (K. B. 1759), 2 Wils. 87; or of burglary, *Somers v. House* (1694), Holt, 39; or of murder, *Batton v. Heyward* (1722), 8 Mod. 24; or of perjury, *Roberts v. Camden* (1807), 9 East, 93, 9 R. R. 513; or of larceny, *Tomlinson v. Brittlebank* (1833), 4 B. & Ad. 630, 1 N. & M. 455; is a slander actionable *per se*. So is also a general accusation of crime, *Tempest v. Chambers* (1815), 1 Starkie, 67; *Francis v. Roose* (1838), 3 M. & W. 191, 1 H. & H. 36; *Webb v. Bearan* (*supra*). But if a word like thief, swindler, murderer, forgerer, &c., is used as a term of vulgar abuse and without any intention of imputing a crime, an action for slander does not lie without proof of special damage, or unless the word is in writing. *Barnett v. Allen* (1858), 3 H. & N. 376, 27 L. J. Ex. 412.

Saying of a person that he is suffering from a contagious disease is a slander actionable *per se*; for such an accusation may secure the expulsion of the person from the society of his fellows. For instance, saying that A. is suffering from leprosy, *Taylor v. Perkins* (1607), Cro. Jac. 144; or from the plague, *Villars v. Monsey* (1769), 2 Wils. 403; or from a venereal disease, *Bloodworth v. Gray* (1844), 7 M. & G. 334, gives A. a right of suing for slander without proving any damage. Small-pox has been held not to be a contagious disease for this purpose. *James v. Rutlegh* (1599), 4 Co. Rep. 176.

Saying something of a person which is calculated to injure or prejudice him in his trade, profession, or business is another species of slander actionable *per se*. “There is a distinction between that which is actionable in the case of offices of Honour or Credit as compared with the case of an office of Profit.” *Per* Lord HERSCHELL in *Alexander v. Jenkins* (1892), 1892, 1 Q. B. 797, at p. 801 (61 L. J. Q. B. 634, 66 L. T. 391, 40 W. R. 546). “In offices of profit, words that impute either defect of understanding, of ability, or integrity, are actionable; but in those of credit, words that impute only want of ability are not actionable; as of a justice of the peace. ‘He is a Justice of the Peace. He is an ass, and a beetle headed Justice.’ *Ratio est*, because a man cannot help his want of ability, as he may his want of honesty; otherwise, when words impute dishonesty or corruption, as, in this case, where

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the office is one of credit, and the party charged with inclinations and principles which show that he is unfit and ought to be removed, which is a disgrace." *Per Curiam* in *How v. Prinn* (1702), 2 Salk. at p. 694. The judgment for the plaintiff was affirmed by the House of Lords. 7 Mod. 113, 1 Bro. P. C. 97.

To impute insincerity to a member of parliament is not actionable without proof of special damage. *Ouslow v. Horne* (1771), 3 Wils. 177, 2 W. Bl. 750.

To accuse a beneficed clergyman of preaching false doctrine, *Dr. Sibthorp's Case* (1628), W. Jones, 366; or of immorality, *Evans v. Gwyn* (1844), 5 Q. B. 844; *Gallwey v. Marshall* (1853), 9 Ex. 299, 23 L. J. Ex. 78; *Highmore v. Countess of Harrington* (1857), 3 C. B. (N. S.) 112; or of misappropriation of the sacrament money, *Highmore v. Countess of Harrington*, *supra*, is actionable, for it is likely to procure the clergyman's removal from office. But merely to accuse him of fraud, *Pemberton v. Colls* (1817), 10 Q. B. 461, 16 L. J. Q. B. 403; or of intemperance, *Cucks v. Starre* (1633), Cro. Car. 285, is not actionable without proof of special damage. If a clergyman is not beneficed, immorality &c., imputed to him is not slander actionable *per se*. *Hartley v. Herring* (1798), 8 T. R. 130, 4 R. R. 614; *Hopwood v. Thorn* (1850), 8 C. B. 293, 19 L. J. C. P. 94.

Again to say of a doctor that he is a quack, *Allan v. Eaton*, 1 Roll. Abr. 54; or professionally ignorant, *Collier v. Simpson* (1831), 5 C. & P. 73; or negligent in the treatment of his patients, *Edsall v. Russell* (1843), 4 Man. & Gr. 1090, 5 Scott N. R. 801, 2 Dowl. (N. S.) 641, 12 L. J. C. P. 4; or unskillful, *Southee v. Denny* (1848), 1 Ex. 196, 17 L. J. Ex. 151, is calculated to prejudice him in his practice, and therefore actionable without proof of special damage.

So, to speak of a solicitor that he has betrayed the secrets of his clients, *Martyn v. Burlings* (1597), Cro. Eliz. 589; or cheated in his profession, *Jenkins v. Smith* (1621), Cro. Jac. 586; or that he is ignorant of law, *Dag v. Butler* (1770), 3 Wils. 59; or that he has acted in an unprofessional way, *Phillips v. Jansen* (1797), 2 Esp. 624, is a slander actionable *per se*; but not an accusation of cheating persons who are not professionally connected with a solicitor. *Dogley v. Roberts* (1837), 3 Bing. N. C. 835.

Similarly, to accuse a barrister of ignorance of law, *Banckes v. Allen*, 1 Roll. Abr. 51; or of deceiving his clients, *Snay v. Gray*, 1 Roll. Abr. 57; or of giving bad advice, *King v. Lake* (1672), 2 Vent. 28, is actionable without proof of special damage.

To accuse a justice of the peace of corruption, *Caesar v. Curseny* (1593), Cro. Eliz. 305; *Beaumont v. Hastings* (1610), Cro. Jac. 240; *Masham v. Bridges* (1632), Cro. Car. 223; or of dishonourable or dis-

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graceful conduct, *Harper v. Beaumont* (1605), Cro. Jac. 56, is actionable *per se*; but not to accuse him of mere stupidity. *Bell v. Neal* (1662), 1 Levinz, 22.

Unworthiness or cheating in office imputed to a clerk of a city company, *Wright v. Moorhouse* (1594), Cro. Eliz. 358; or to a churchwarden, *Strode v. Holmes* (1651), Styles, 338, *Jackson v. Adams* (1855), 2 Bing. N. C. 402; or to an officer of the Court of Justice, *Stanley v. Boswell* (1598), 1 Roll. Abr. 559; *Moor v. Foster* (1606), Cro. Jac. 65; or to a constable, *Taylor v. Howe* (1601), Cro. Eliz. 861, is actionable *per se*.

A tradesman accused of adulteration of goods, *Jesson v. Hayes* (1636), Roll. Abr. 63: or of being in financial difficulties, *Barnes v. Holloway* (1799), 8 T. R. 150, *Whittington v. Gladwyn* (1825), 5 B. & C. 180, 2 C. & P. 146; *Brown v. Smith* (1853), 13 C. B. 596, 22 L. J. C. P. 151; or of insolvency, *Robinson v. Marchant* (1845), 7 Q. B. 918, 15 L. J. Q. B. 136; or of dishonesty in the conduct of his business, *Thomas v. Jackson* (1825), 3 Bing. 104; or of using false weights or measures, *Griffiths v. Lewis* (1846), 7 Q. B. 61, 15 L. J. Q. B. 249, may sue for slander without proving special damages.

Incapacity attributed to a land agent, *London v. Eastgate*, 2 Roll. Abr. 72; or to a veterinary surgeon, *Hirst v. Goodwin* (1862), 3 F. & F. 257; or to a schoolmaster, *Hume v. Marshall* (1878), 42 J. P. 136; or to an architect, *Botterill v. Whytehead* (1879), 41 L. T. 588, is actionable *per se*.

In *Alexander v. Jenkins* (1892), 1892, 1 Q. B. 797, 61 L. J. Q. B. 634, 66 L. T. 391, 40 W. R. 546, the plaintiff was elected the town councillor of a borough. The defendant said of him, "He is never sober, and is not a fit man for the Council. On the night of the election he was so drunk that he had to be carried home." It was held that the words were not actionable, for the office was not one of profit, and the charge, if true, would not have resulted in his dismissal from the office. The result would have been different had the accusation been of misconduct in office, and not merely of unfitness for office.

Words imputing dishonesty or malversation in a public office of trust are actionable *per se*, though the office be not of profit. *Booth v. Arnold* (C. A. 1895), 1895, 1 Q. B. 571, 64 L. J. Q. B. 443, 72 L. T. 310, 43 W. R. 360.

Imputation of unchastity to a woman or girl is by the Slander of Women Act 1891, (54 & 55 Vict. c. 51) rendered actionable *per se*.

AMERICAN NOTES.

The principal case is cited in Townshend on Slander and Libel, and its doctrine adopted on the ground that written words have "a greater capacity

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for injury than is attributed to language spoken" (sect. 18). This distinction is recognized in *Newell on Defamation*, sect. 16, "when the words by being written can no longer be considered as the results of transitory passion or venial levity, but therein gain the shape and efficacy of a mischievous malignity. The act of writing is in itself an act of deliberation and the instrument of a permanent mischief."

The principal case is cited in *Tillson v. Robbins*, 68 Maine, 295; 28 Am. Rep. 50, where it is said: "Much which if only spoken might be passed by as idle blackguardism, doing no discredit save to him who utters it, when invested with the dignity and malignity of print, is capable, by reason of its permanent character and wide dissemination, of inflicting serious injury." Citing *McCorkle v. Binns*, 5 Binney (Penn.), 340; 6 Am. Dec. 420; *Dexter v. Spear*, 4 Mason (U. S. Sup. Ct.), 115; *Obaugh v. Finn*, 4 Arkansas, 110; 37 Am. Dec. 773; *Dunn v. Winters*, 2 Humphreys (Tennessee), 512; *Clark v. Binney*, 2 Pickering (Mass.), 113; citing the principal case, *Hillhouse v. Dunning*, 6 Connecticut, 391; citing the principal case, *Shelton v. Nance*, 7 B. Monroe (Kentucky), 128; *Magrant v. Richardson*, 1 Nott & McCord (So. Car.), 317; *Colby v. Reynolds*, 6 Vermont, 489; 27 Am. Dec. 574; *Steele v. Southwick*, 9 Johnson (New York), 214; *Dole v. Lyon*, 10 Johnson (New York), 449.

In *Colby v. Reynolds*, *supra*, the Court said: "A distinction has long been known and recognized between verbal and written slander. Words, when committed to writing and published, are considered as libellous, which if only spoken, would not subject the person speaking to any action. Perhaps it is to be regretted that any distinction was ever made between oral and written slander, and if it was a new question, no distinction would now be made. The reasons which have been given for the distinction, have been questioned both by writers and Judges of eminence. It has been made, however, and has become a part of the law, and as such we must receive it. There can be no question but that a slander written and published evinces a more deliberate intention to injure, is calculated more extensively to circulate the accusation and to provoke the person accused to take the means of redress into his own hands, and thus to commit a breach of the peace, than mere oral slander, which is spoken and soon forgotten. The report in circulation in relation to the defendant, while it was a mere report, was confined to the neighborhood, and could not have been very extensively known. Whereas had it been published, as was the slander of which the plaintiff complains, it would have been known to every reader of the paper, and have circulated as extensively as the paper circulated, and have excited the curiosity of many who never had heard of the parties before.

"Words spoken must impute some crime so as to endanger the person to whom they relate, or they must impute to him something which would tend to exclude him from society, and lead one to avoid him. But a publication which renders the person ridiculous merely, and exposes him to contempt, which tends to render his situation in society uncomfortable and irksome, which reflects a moral turpitude on the party and holds him up as a dishonest and mischievous member of society, and describes him in a scurrilous and

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ignominious point of view, — which tends to impair his standing in society, as a man of rectitude and principle, or unfit for the society and intercourse of honorable and honest men, is considered as a libel.”

In a note to *Clark v. Binney*, *supra*, the reporter (apparently) observes: “This distinction between written and verbal slander has not the least foundation in principle,” — an opinion from which the present writer may be allowed to dissent — “although it seems firmly established by decisions both in England and in this country.” In *Dole v. Lyon*, *supra*, Chief Justice KENT pronounced “printed slander” “much more pernicious” than oral slander. In *Obaugh v. Finn*, *supra*, the Court said that the distinction “is too well established to be now questioned or departed from.” “The presumption that words are defamatory arises much more readily in cases of libel than in cases of slander.” *Collins v. Desp. Pub. Co.*, 152 Pennsylvania State, 187; 34 Am. St. Rep. 636. See note, 15 Am. St. Rep. 333.

The principal case is extensively noticed and followed in *Cooper v. Greeley*, 1 Denio (New York), 362.

The principle under discussion has been held to justify actions of libel in the following peculiar cases: for calling a man a swine, *Solverson v. Peterson*, 61 Wisconsin, 198; 54 Am. Rep. 607; or a miserable fellow, *Brown v. Remington*, 7 Wisconsin, 462; or a rascal, *Williams v. Karnes*, 4 Humphreys (Tennessee), 9; or insane, *Moore v. Francis*, 121 New York, 199; 18 Am. St. Rep. 810; or an anarchist, *Cerreny v. Chicago, &c. Co.* 139 Illinois, 345; 13 Lawyers’ Rep. Annotated, 864; or for charging a woman with neglecting her sick husband, *Smith v. Smith*, 73 Michigan, 445; 16 Am. St. Rep. 594; 3 Lawyers’ Rep. Annotated, 52; or for charging a man with being threatened with a suit for breach of promise of marriage, *Morey v. Morning J. Ass’n*, 123 New York, 207; 20 Am. St. Rep. 730; or for charging that a woman said her mother acted like a cat, *Stewart v. Swift S. Co.*, 76 Georgia, 280; 2 Am. St. Rep. 40. (In this last case the CHIEF JUSTICE said, “It is rather difficult to read it without a sort of pity, which explodes in laughter, when the old woman is mewling like a cat and fixing to spring upon rats and mice.” So where a governor was charged with having pardoned his brother out of prison, *State v. Brady*, 44 Kansas, 435; 9 Lawyers’ Rep. Annotated, 606; or an actor was charged with discourtesy. *Williams v. Davenport*, 42 Minnesota, 393; 18 Am. St. Rep. 519. So of a coarse and blotted imitation of the plaintiff’s handwriting in a newspaper, expressing his views on the tariff. *Belknap v. Ball*, 83 Michigan, 583; 21 Am. St. Rep. 622.

SECTION II. — *Publication.*No. 2. — *PARKES v. PRESCOTT.*

(EX. CH. 1869.)

No. 3. — *EMMENS v. POTTLE.*

(C. A. 1885.)

RULE.

A PERSON is liable as the publisher of a libel, where he has communicated libellous matter to another requesting or intending that the latter should publish it, and where the substance of the communication has been published accordingly.

But an “innocent disseminator,” *e. g.*, the seller of a newspaper in the ordinary course of his business, is not liable, if he, without negligence, did not know, and had no ground for supposing, that the newspaper was likely to contain libellous matter.

Parkes v. Prescott and Ellis.

38 L. J. Ex. 105–113 (s. c. L. R., 4 Ex. 169; 20 L. T. 537; 17 W. R. 773).

[105]

Libel. — Publication. — Authority.

In an action for libel the plaintiff complained of the publication in certain newspapers of reports of the proceedings of a board of guardians containing defamatory statements concerning himself. At the meeting at which the proceedings in question took place reporters were present in the discharge of their duty as representatives of the newspapers. One of the defendants was chairman of the meeting, and the other was present and took part in the proceedings. The latter said that he hoped the local press would take notice of “this scandalous case,” and requested the chairman to give an account of it. This he accordingly did, and in the course of his statement said, “I am glad gentlemen of the press are in the room, and I hope they will take notice of it.” The other defendant thereupon said, “And so do I.” The reports complained of were afterwards inserted in the newspapers, being somewhat condensed but substantially correct accounts of what had been said at the meeting. These reports were set out in the declaration, and constituted the libels complained of. The Judge at the trial directed a verdict for the defendants, on the ground that there was no evidence of a publication by the defendants of these libels, to which direction the plaintiff excepted: *Held* (per KEATING, J., MONTAGUE SMITH, J.,

No. 2. — *Parkes v. Prescott*, 38 L. J. Ex. 105.

and HANNEN, J., *dissentientibus*, BYLES, J., and MELLOR, J.,) that the direction was wrong, and that there was evidence for the jury.

Per BYLES, J.— There is a distinction between the authority which will make a man liable criminally and that which will make him liable civilly for the acts of another.

Per KEATING, J., MONTAGUE SMITH, J., and HANNEN, J. — The man who requests another to make and publish an outline or summary of a speech, writing or proceedings, must know that the words will be to some extent those of him who makes such summary or outline, and he must be taken therefore to constitute him an agent for the purpose and be answerable for the result, subject to the question whether the authority has been really followed.

This was a bill of exceptions to the ruling of MARTIN, B., at the trial of this cause.

The first count of the declaration stated that the defendants falsely and maliciously caused to be printed and published of the plaintiff in a certain newspaper called the “Marylebone Mercury” the words following:—

“At the last meeting of the guardians of this parish (meaning the parish of Paddington) a young woman named Mary Anne Parkes, daughter of Mr. J. J. Parkes, of 17 London Street, Paddington (meaning the plaintiff), was brought before the board and examined by them, she having become an inmate of the workhouse. After hearing her statements the guardians resolved that ‘Admission to the workhouse having been granted to Mary Anne Parkes, the clerk be directed to write to her father, of London Street (meaning the plaintiff), informing him that the guardians will require him to pay for his daughter’s maintenance during her chargeability.’ To-day the following letter was read by the clerk from the young woman’s father (meaning the plaintiff):—

“‘17 London Street, Paddington, Feb. 1868.

“‘H. Aveling, Esq.

“‘Sir, — I beg to acknowledge yours of the 7th, and say that I am glad to hear my daughter is safe, and I will call and see you relative. — I am, Sir, your obedient servant, J. J. PARKES.’

“The chairman (meaning the chairman of the said board, and the defendant, Frederick Joseph Prescott) said that considering the circumstances under which the young woman (she was twenty-two years of age) came into the house, the coolness displayed by

the father (meaning the plaintiff) was something incredible. Mr Ellis (meaning the defendant William Ellis) hoped the local press would take notice of this very scandalous case, and requested the chairman to give an outline of it. This was done by [*106] several members of the board, the * following being the chief facts: The young woman, it appears, is of rather weak intellect, and had been residing with a relative at Brighton. She arrived in London in consequence of something she had heard, and went to her father's (meaning the plaintiff's) house, but was told by the servant she could not admit her. The father (meaning the plaintiff) being out, the girl went away, and came back after his arrival and again asked admission. This was most rudely and offensively refused, and she was told she might go where she liked. She consequently sought admission into the workhouse, which was granted her. The chairman said that the girl had told the board some other statements as to the offensive and cruel mode in which her father had told her to take herself off, but these he would not now repeat. A member of the board said the girl had stated that her father (meaning the plaintiff) said she was now old enough to get her living. The chairman remarked that the man (meaning the plaintiff) evidently wished to avoid paying for his daughter's maintenance, and suggested that legal proceedings should be adopted in case of his further refusal to pay. The chairman's suggestion was adopted, the whole board agreeing in stating that Mr. Parkes's conduct was 'most disgraceful, and deserved exposure,' whereby the plaintiff's credit and reputation were injured, &c.

Second count, that the defendants falsely and maliciously caused to be printed and published of the plaintiff in a certain newspaper called the "Paddington Times" the words following:—

"Among other minutes of the board (meaning the Paddington board of guardians) the clerk read one relative to the admission into the workhouse of Mary Anne Parkes, aged twenty-two years, the daughter of J. J. Parkes (meaning the plaintiff), a gas-engineer, in a large way of business at No. 17 London Street, Paddington. The minute in question was one instructing the clerk to write to Mr. Parkes (meaning the plaintiff), informing him the guardians will require him to pay for his daughter's maintenance during the time she is chargeable to the parish. The answer to this letter is as follows:—

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“ ‘ 17 London Street, PADDINGTON, Feb. 7, 1868.

“ ‘ SIR,— I beg to acknowledge yours of the 7th inst., and say I am glad to hear my daughter is safe, and I will call and see you relative.—I am, Sir, your obedient servant, J. J. PARKES.’

“ ‘ To H. Aveling, Esq.’

“ Mr. Wyatt (meaning one of the said guardians) asked if the young woman had misconducted herself in any way, and also whether her father (meaning the plaintiff) had actually turned her out of doors. The chairman (meaning the chairman of the said board, and the defendant Frederick Joseph Prescott) said he believed the young woman had not got a very strong intellect. She was present at the last meeting of the board, and there stated that a short time ago she was living at Brighton, and returned from there in consequence of a letter which she had received from her father (meaning the plaintiff). On arriving in London she naturally expected that some one would meet her at the station, but her anticipations were not realized, and when she presented herself at her father’s (meaning the plaintiff’s) house, the servant told her she had strict injunctions from her master (meaning the plaintiff) not to admit her, adding that Mr. Parkes (meaning the plaintiff) was not then at home. The young woman went a second time, and was refused admittance in like manner. Mr. Wyatt (meaning the said guardian) said if the allegations were true, then Mr. Parkes (meaning the plaintiff) was nothing but a brute. The chairman quite concurred in this, and hoped publicity would be given to the matter. Mr. Gosslet, sen. (meaning one of the said guardians), said it was no use parleying with such a man. The best way would be to at once summon him before a police magistrate. Mr. Chew (meaning one of the said guardians) said that one of his daughters and a sister of Mary Anne Parkes were teachers at the Craven Hill Chapel Sunday Schools, and on hearing of this occurrence he invited the sister to his house. When she came he questioned her upon the subject, and she told him her father (meaning the plaintiff) was anything but a good man, and that her stepmother was not to blame for their many domestic troubles. There was nothing * whatever against [* 107] the character of Mary Anne Parkes to justify her father (meaning the plaintiff) in turning her out of doors. Mr. Todd (meaning one of the said guardians) said the unfortunate young woman would have had to walk the streets all night had it not

been for the kindness of Mr. Sullivan, who furnished her with an asylum in his own house. Some further conversation took place upon the subject, after which it was resolved to warn Mr. Parkes (meaning the plaintiff) that if he did not pay for the whole of his daughter's maintenance he should be proceeded against in the police court," whereby the plaintiff's credit and reputation were injured, &c.

Plea — Not guilty. Issue thereon.

The trial took place, before MARTIN, B., at the Sittings in Middlesex, after Trinity Term, 1868. The reporters for the two papers were called for the plaintiff. They proved that they attended at the meeting in question in the ordinary course of their duty as the representatives of the papers to which they were respectively attached. The reports which were set forth in the declaration as the libels complained of were somewhat condensed but substantially accurate accounts of the proceedings which took place at the meeting of the board of guardians. During the discussion which occurred, the defendant Ellis said that he hoped the local press would take notice of "this very scandalous case," and requested the defendant Prescott, who was chairman of the meeting, to give an outline of it. Prescott accordingly did so, and in the course of the statement which he made said, "I am glad gentlemen of the press are in the room, and I hope they will take notice of it." The defendant Ellis thereupon said, "And so do I." The defendant Prescott also said that he hoped publicity would be given to the matter.

The learned Judge ruled that there was no evidence of publication of the libels complained of by the defendants, and accordingly directed a verdict to be entered for the defendants.

To this direction the plaintiff's counsel excepted in the following terms: "That the learned Judge should not have directed the jury that there was no evidence to go to them, and should have directed the jury that there was evidence for them that the defendants intended defamatory statements should be published of the plaintiff, and that the libels which appeared were what the defendants meant should be published."

Giffard, with him J. C. Mathew, (Feb. 9) for the plaintiff. — The question is, whether there was evidence for the jury of a publication by the authority of the defendants. It is submitted that there was abundant evidence. It is laid down in Starkie on Libel,

2d edit., Vol. II., p. 225, "According to the general rule of law, it is clear that all who are in any degree accessory to the publication of a libel, and by any means whatever conduce to its publication, are to be considered as principals in the act of publication. Then, if one suggest illegal matter in order that another may write or print it and that a third may publish it, all are equally amenable for the act of publication when it has been so effected." Here defamatory matter was uttered for the express purpose of being published, and the representatives of the public press were invited and requested to publish it.

[BYLES, J. The difficulty is to connect the actual libel with the authority; you must prove that the defendants authorized this particular libel.]

It is sufficient, if the account actually published was, in substance, within the meaning of the authority given. The case of *The Queen v. Cooper*, 8 Q. B. 533; 15 L. J. Q. B. 206, is on all-fours with the present.

[BYLES, J. In that case there was evidence of subsequent approval of the libel.]

Lord DENMAN, C. J., says that "It is enough that there is a substantial identity."

[MELLOR, J. He is the only Judge that held so; COLERIDGE, J., and WIGHTMAN, J., rely on the approval. BYLES, J. There may be widely different ways of reporting the same occurrence; one way might insure a verdict for £100, another for a farthing.]

Surely it would be a question for the jury whether the libel actually published was in accordance with the authority.

Philbrick for the defendants.—There is no evidence against the defendants that they authorized the publications of the libels set out in the declaration, and the burden of proof lies on the plaintiff. In the first place, the occasion was privileged; and how can the independent wrongful *act of the reporter [*108] convert what otherwise would have been privileged into a libel? Even if it must be taken that there was authority to publish a report, it does not follow that the report to be published was to be libellous, still less that these particular libels were to be published. But, in reality, putting a reasonable construction on what the defendants did, there was no authority or request to publish,—only the expression of a hope that the matter would be reported, or, at most, of an honest opinion that it was a matter

proper to be reported in the public press. He cited *Harding v. Greening*, 1 Moor, 477.

Giffard in reply.

Cur. adv. vult.

On the 14th of May the judgment of the majority of the Court (KEATING, J., MONTAGUE SMITH, J., and HANNEN, J.) was delivered by —

MONTAGUE SMITH, J. This is an action of libel, and came before the Court upon a bill of exceptions to a direction given by MARTIN, B., to the jury on the trial of the cause, directing them to find for the defendants, on the ground that there was not sufficient evidence for their consideration of the publication of the libels. The libels complained of were reports of certain proceedings at a meeting of the board of guardians for the parish of Paddington, which were published in some local newspapers. It appeared in evidence that, at this meeting, a discussion took place respecting the conduct of the plaintiff towards his daughter, who was then an inmate of the workhouse; and the history of the case, as stated at the meeting, in the absence (be it observed) of the plaintiff, and the remarks made upon it were of a highly defamatory nature, — indeed, the story was spoken of by one of the defendants at the meeting as a very scandalous case, with reference to the conduct of the plaintiff. The defendant Prescott was chairman of the meeting, and Ellis, the other defendant, was also present, taking part in the proceedings. Reporters of the local newspapers in which the libels appeared attended the meeting. The following evidence was given to connect the defendants with the publication. The defendant Ellis said he hoped the local press would take notice of this very scandalous case, and requested the chairman to give an outline of it. This was done by several members of the board, and the chief facts were then taken down by the reporters. The defendant Prescott also said, in the course of his statement relative to the case, “I am glad gentlemen of the press are in the room, and I hope they will take notice of it.” On which the other defendant, Ellis, said, “And so do I.” The defendant Prescott also said he hoped publicity would be given to the matter. It was proved by the reporters that the reports published were a correct summary of what took place, and one of the reporters stated that he had told the editor of the paper what the defendants had said before the publication. It was contended, in

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support of the direction, that the words used by the defendants did not amount to a request to the reporters to publish the proceedings, but were merely the expression of a wish or hope that they would do so; nor to an authority to publish the particular reports in the words in which they, in fact, appeared; and that there was no evidence to go to the jury. But, upon consideration of the circumstances of the case, I think there was evidence for the jury on the two questions which ought to have been submitted to them, viz., first, of a request to publish the proceedings of the meeting relating to the plaintiff's conduct; and, secondly, that the reports contained a correct account of the proceedings as the defendants meant it should appear. There was evidence to the effect that the defendant Ellis not only said he hoped the local press would take notice of the case, but that he requested the other defendant, Prescott, to give an outline of it. For what purpose? Obviously for the very purpose of having the outline so given taken down by the reporters and published in the newspapers. It was further proved that, in pursuance of this request, the outline was given, and the chief facts taken down by the reporters and afterwards put into a report. It seems to me that these facts afford evidence fit, at all events, to be laid before the jury of a request to the reporters to publish an outline or summary of the proceedings, and (taken with the rest of the evidence) to publish their report in such a way as to show the conduct of the plaintiff to have been disgraceful; for a disclosure to the *local [*109] public of what was called the plaintiff's disgraceful conduct was the avowed object of the request made by the defendants to the reporters. There was also the clear evidence of the reporters, if the jury had believed it, that the reports were, in substance, correct. I agree with the learned counsel for the defendants, that loose expressions of a mere wish or hope that proceedings should be published would not be sufficient to fix liability on the defendants in cases like the present. I think the words must be of such a kind, and used in such a manner as to satisfy the jury that they amounted to and were, in fact, a request to publish. If the words do amount to such a request, and the publication be made in pursuance of it by the persons to whom it was addressed, then it seems to me the persons making such request would be responsible for the libellous matter so published. Whether the libellous matter published is in pursuance of and in

accordance with the request, or a departure from it, and so unauthorized, would be a question to be considered on the circumstances of the particular case. It is, of course, plain that, if a man gives a copy of his speech to another to publish, he is answerable as a publisher of it. It cannot be contended that he would not be equally answerable if he desired a reporter to take down his speech as he delivered it, and to publish it. Then, can it make any difference in his liability that he requested the reporter, instead of publishing the whole speech, to make and publish an outline or summary of it? Surely, in reason and principle, there can be none, where the request is acted on and a correct outline or summary made and published. It was strongly urged for the defendants that they could not be liable unless they authorized the libel in the very words in which it was published. If this argument is correct, then it must follow that a man could never be liable when he desired another to make and publish an outline or summary of a speech or writing, because such an outline or summary necessitates condensation, and consequently alteration of language. But the argument cannot, as it seems to me, be correct. The man who requests another to make and publish an outline or summary of a speech, writing, or proceedings, must know that the words will be, to some extent, those of him who makes such summary or outline; and he must therefore be taken to constitute him an agent for the purpose and be answerable for the result, subject always to the question whether the authority has been really followed. If this be not so, a man might become a libeller with impunity. Again, if the very words of the libel, and not its substance, are, in these cases, to be regarded, a man who gives the manuscript of a libel to an agent to print and publish would not be answerable if, by accident or negligence, there were variations in some of the words, although not in the substance of the libel. There are few decided cases in point, but those to which we were referred are in accordance with the principles on which I think there is evidence of the defendants' liability. In *Adams v. Kelly*, 1 Ry. & M. 157, the defendant orally communicated to the reporter of the "Observer" newspaper a defamatory story respecting the plaintiff, which he said would make a good case for a newspaper. The reporter took down in writing what the defendant said, and what he so took down was, with some slight alterations made by the editor, not affecting the

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sense, published. Lord TENTERDEN told the jury that “ what the reporter published in consequence of what passed with the defendant may be considered as published by the defendant,” and the plaintiff had a verdict. In that case the libel had been, in some degree, altered, and the very words of the defendant were not used; but the sense was preserved, and that was sufficient to fix the defendant. In the case of *The Queen v. Cooper*, the facts were not unlike those in the present case. The defendant asked the reporter of a newspaper to “ show up ” the prosecutor, and narrated to him a defamatory story which it appeared the reporter had before heard. In that case there was, no doubt, evidence which does not exist here, that the defendant had approved of the libel after it was published by saying he had seen it and liked it very much; and that circumstance was relied on by COLERIDGE, J., as the ground of his decision. Lord DENMAN, C. J., however, in giving judgment in that case, says: “ If a man requests another generally to write * a libel, he must be answerable for any libel written [* 110] in pursuance of his request. He contributes to a misdemeanor and is therefore responsible as a principal. He takes his chance of what is to be published.” This is a principle larger than is necessary for the decision of this case, for here there is evidence that the libel is a correct account of the proceedings which the defendants requested to be published. In the result, I come to the conclusion that, on principle, it is correct to hold that, where a man makes a request to another to publish defamatory matter, of which, for the purpose, he gives him a statement, whether in full or in outline, and the agent publishes that matter, adhering to the sense and substance of it, although the language be to some extent his own, the man making the request is liable to an action as the publisher. If the law were otherwise, it would, in many cases, throw a shield over those who are the real authors of libels, and who seek to defame others under what would then be the safe shelter of intermediate agents. I make this observation only with reference to the general consequences which would result from the arguments relied on to sustain the defendants’ contention. With regard to the particular case, it is enough to say that, in my opinion, there was evidence which ought to have been left to the jury, and that consequently there should be a *renire de novo*. My learned Brothers KEATING and HANNEN concur in this judgment.

BYLES, J. This is a case involving principles of great importance and daily application, and I therefore much regret the division of opinion. It was an action for a libel. The declaration alleges that the two defendants caused to be published in a newspaper "the words following." It then sets out in two counts several passages of a long newspaper report of a parish meeting containing various defamatory charges against the plaintiff. No evidence was given of any direction by the defendants to publish the precise words set out in the declaration, or, indeed, to publish any particular part of the libel, either as set out in the declaration or as laid *in extenso* before the jury. The only direct evidence to charge the defendants with the libel was this, that they said they hoped the press would take notice of the case, and that publicity would be given to it. By comparing the parol evidence with the libel itself, it may be collected that one of the defendants said he hoped the chairman would give an outline of the proceedings. It did not appear that the defendants had ever made or seen any outline or afterwards approved of the libel, or even seen it. I very much doubt whether the expression of a hope that the press would take notice of the case or give publicity to it, or that the chairman would give an outline of the proceedings, amounts to an authority to publish in a newspaper defamatory and unjustifiable matter spoken at a meeting. Suppose reporters are engaged to report at a public meeting, is any one who requests or assents to their services liable to an action of libel for a report in a newspaper not only of what may have been said by himself, but of what may have been said by other speakers, and reported in the newspapers accordingly. Before, however, we arrive at this novel and most important question, the common law interposes a technical difficulty. It is not sufficient at common law that expressions equivalent to those set out in the declaration were written and published by a defendant. The libel must be proved as laid in the declaration. It was at one time thought that the plaintiff need only prove the substance of a libel. But that doctrine was overruled in Lord MANSFIELD's time: — see *The King v. Berry*, 4 T.R. 217, and it is now clear law that the words of a libel must be set out in the declaration and must be proved as laid. A variance is fatal. It is true a variance is now amendable. But no amendment was here asked for or made, or could be made so as to cure the objection that the evidence does not show what particular

parts or what particular defamatory expressions were or were not authorized by the defendants. And this is not an objection of form, but of substance. Among other reasons for this is that the sting of a libel may be sheathed in the particular instances of misconduct imputed in the libel, or even in the particular expressions used. Take the case of oral slander, an extreme case it is true, but extreme cases test principles. Suppose A., in general terms, without specifying any particular accusation, *should desire B. to defame C., and B. accordingly speaks [* 111] and publishes the words "C. is a murderer," can A. be sued in an action wherein the declaration should allege that he, A., spoke and published the words "C. is a murderer"? But it does not follow that C. has no remedy against A. It may well be that A. in the case supposed would be liable to a special action on the case at the suit of C. for inducing B. to defame C. I see no reason why the originator of a libel may not be reached in the same manner. The counsel for the plaintiff were therefore, in the argument before us, asked for authorities to prove that a man could be liable in a civil action for a particular libel, the words of which he had neither written nor dictated or spoken beforehand, nor himself published or assented to afterwards. Two cases only have been brought under our notice. *Adams v. Kelly* and *The Queen v. Cooper*. But in *Adams v. Kelly*, precise instructions were given and taken down in writing for the insertion of the particular defamatory expressions used in a particular newspaper, the "Observer," and Lord TEXTERDEN insisted on those precise instructions being laid before the jury. The only other case cited was a criminal case, *The Queen v. Cooper*. But in that case it was shown that after the libellous article came out, the defendant had seen it, and had expressed his approbation of it. That case was, moreover, a criminal case. It was an indictment for a libel. And there is a great distinction between the authority which will make a man liable criminally and the authority which will make him liable civilly. A principal is not civilly liable for the acts of his agent unless the agent's authority be by the agent duly pursued, but the principal may be criminally liable though the agent may have deviated very widely from his authority or instructions, or, as Lord Bacon puts it (Bacon's Maxims, 16), "Lawful authority is to receive a strict interpretation, unlawful authority a wide and extended interpretation." "Mandata licita

recipiunt strictam interpretationem, sed illicita latam et extensam." Lord Bacon proceeds to comment on this maxim and says, "In committing of lawful authority to another, a party may limit it as strictly as it pleaseth him, and if the party authorized does transgress his authority, though it be but in circumstances expressed, yet it shall be void in the whole act. But when a man is author and monitor to another to commit an unlawful act, then he shall not excuse himself by circumstances not pursued." This distinction Lord Bacon proceeds to illustrate by examples in civil and criminal cases. Thus, he says, "If a man command J. S. to kill J. D. on Shooter's Hill and he doth it on Gad's Hill, or to kill J. D. by poison and he doth it by violence, in these cases, notwithstanding the fact be not executed, yet he is accessory nevertheless." And he goes on to show that a man cannot impose a condition on an unlawful act. As if a man bid J. S. to steal in a house and expressly restrain him from so doing except when he can get in without breaking, but J. S. breaks into the house and steals, yet the principal is accessory to the burglary, for, says Lord Bacon, "a man cannot condition with an unlawful act, but he must at his peril take heed how he putteth himself into another man's hands." It is true that a libel is a criminal act, but in this case the plaintiff does not proceed for the criminal act, but for the civil injury. Reading the case of *The Queen v. Cooper* with the light of this distinction between civil and criminal proceedings, which distinction is clear law and sound sense, it may well be that when a defendant tells the editor of a newspaper, as he did in that case, to show another up, and the editor of the newspaper does in gross terms unauthorized and not intended by the defendant, the latter may nevertheless be criminally liable, though he might not be civilly liable. Besides, in misdemeanors, although all who procure, abet, assist or assent to, are principal misdemeanants, yet the Judge may apportion and restrain the punishment to the real demerits of each delinquent. But in a civil action the object is damages, which cannot be apportioned among the defendants: but all who remain on the record must be liable for the whole amount, and neither of the defendants in this action is liable except for what both authorized. These considerations lead me to the conclusion that the learned Judge was right in directing the jury to find a verdict for the defendants.

MELLOR, J. The question in this case arose on a bill of

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exceptions to the ruling* of MARTIN, B., on the trial of [* 112] an action of libel, brought by the plaintiff against the defendants, for falsely and maliciously causing to be printed and published certain libels, in newspapers called the "Borough of Marylebone Mercury" and the "Paddington Times," of and concerning the plaintiff. The plea was not guilty. The libels in question consisted of a report of what took place at a meeting of the board of guardians of the parish of Marylebone, respecting the case of a girl named Mary Ann Parkes, the daughter of the plaintiff, and of the observations of various members of the board at such meeting relating thereto. The libel complained of was furnished to the newspapers in question by reporters who were accidentally present in the course of their duty, and who reported the proceedings as articles of news to the respective newspapers. It was not alleged that the report was approved or seen by the defendants. It was proved that the defendant Prescott was in the chair at the meeting, and that Ellis, the other defendant, was present. The report in question was a summary of what took place at such meeting. The defendant Ellis, in the course of the discussion, said, "he hoped the local press would take notice of this very scandalous case," and requested the other defendant, Prescott, to give an outline of it. The defendant Prescott, in the course of a statement to the guardians of the case, said, "I am glad gentlemen of the press are in the room, and I hope they will take notice of it," upon which the other defendant, Ellis, said, "And so do I;" and further, the defendant Prescott said he hoped publicity would be given to the case. The counsel for the plaintiff having proved that the libel in question contained a summary of the proceedings by calling the two reporters, stated that he had no further evidence to offer in support of the defendants' liability, whereupon the counsel, on the part of the defendants, insisted that in the absence of further evidence "there was not sufficient evidence to go to the jury in support of the issue above joined." Baron MARTIN thereupon declared his opinion to the jury, that the several matters so given in evidence were not sufficient evidence to go to them, and directed them to find a verdict for the defendants. Upon the question thus raised upon the bill of exceptions for our determination, I am of opinion that Baron MARTIN rightly directed the jury to find a verdict for the defendants. It is to be observed that the two reporters were not taken to the meeting of the board of guardians by the defendants, but were

present there, in the course of their duty, to report matters of interest to the inhabitants of the district in which the newspapers in question circulated. They exercised their own discretion as to what they would report, and they proved that each report in question contained a summary only of the proceedings and observations of the various guardians present. Neither summary was seen by either of the defendants, who were entirely ignorant of the mode in which the reporters might, in their discretion, deal with the proceedings and observations made at the meeting. It appears to me that it would be most pregnant with mischief if every speaker at a meeting, at which reporters for the public press may be present, could be made responsible by indictment or action for what reporters chose, in their discretion, to report in a summary of the proceedings, because he happened to say that he hoped the press would take notice of the case, or would give publicity to the matter, or any similar expression. In spoken slander the defendant is only liable for his own expression; but if the plaintiff should succeed in this action, it would tend to confound the well-settled distinction between oral slander and libel, and would make a man responsible not for his own expression only, but for all the observations made by any other person who might be present at such meeting. I think that, in order to make a man responsible for a report printed and published by a third person, it ought to be shown that he had seen or heard, or dictated the report itself, or approved of the libellous statement therein. There are but few cases which bear upon this subject, and the one mainly relied upon by the counsel for the plaintiff was *The Queen v. Cooper*, in which Lord DENMAN, C. J., is reported to have said, that "if a man request another generally to write a libel, he must be answerable for any libel written in pursuance of his request; he contributes to a misdemeanor, and is therefore responsible as a principal." It is to be observed, that WIGHTMAN, J., [* 113] who tried the case, and COLERIDGE, J., placed their judgment on the special circumstances of the particular case, and indirectly declined to approve the large proposition asserted by Lord DENMAN. COLERIDGE, J., said, "I agree on a very short ground. The question is, whether there be evidence that the defendant approved of *this*, not *a* libel," and, again, "I do not put the argument beyond this, that materials are furnished, then complaint is made that the expected publication does not appear; that perhaps does not carry the proof much further. But when

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it does appear the defendant gives judgment against himself by approving of it." And WIGHTMAN, J., said, "It appears to me to be proper to be left to them, whether on the evidence they believed that this libel was what the defendant meant to be published. It would be very dangerous to allow a man to direct a libel to be published on a particular subject, and after he has approved of what is published to defend himself on the ground that something has been added to his original communication." In that case, the evidence showed that the defendant had expressed to the editor of the newspaper his desire that he would 'show up' the prosecutor, and then told him the story, and after the interview, when the libel appeared, the defendant told the editor that he had seen it, and liked it very much. The facts of that case are entirely different from the present, and it certainly cannot be said to be an authority in favour of the plaintiff in this case, except so far as the *obiter dictum* of Lord DENMAN is concerned, and that appears to have arisen out of the argument as applied to the particular facts of that case. The case of *Adams v. Kelly*, also cited for the plaintiff, does not really maintain the contention of the counsel for the plaintiff. In that case the editor of a newspaper had published, with slight alterations not affecting the sense, a written statement from his reporter, the contents of which had been communicated to him by the defendant for the purpose of such publication, and under such circumstances it was rightly held that the defendant would be liable. Those cases, when the facts of them are carefully considered, fall far short of the proposition of the counsel for the plaintiff in the present case. I think that, in order to support the allegation that the defendants caused to be printed and published the libels set out in the declaration, there ought to have been evidence of a communication, either verbal or written, of the entire substance of the libel to the reporter as the libel to be published, or that either before or after the publication thereof, the defendant sought to be charged saw and approved of the particular libel; and inasmuch as in the present case the expressions used only indicate a wish that the gentlemen of the press present would notice the case or call attention to it, or give publicity thereto, leaving the mode and manner to the absolute discretion of the reporter, I am of opinion that Baron MARTIN was justified in holding the evidence not to be sufficient to be submitted to the jury, in support of the issue joined upon the pleadings.

Venire de novo.

Emmens v. Pottle and Others.

16 Q. B. D. 354-358 (s. c. 55 L. J. Q. B. 51; 53 L. T. 808; 34 W. R. 116).

[354]

Libel. — Publication. — Newspaper.

The vendor of a newspaper in the ordinary course of his business, though he is *primâ facie* liable for a libel contained in it, is not liable, if he can prove that he did not know that it contained a libel; that his ignorance was not due to any negligence on his own part; and that he did not know, and had no ground for supposing, that the newspaper was likely to contain libellous matter. If he can prove those facts he is not a publisher of the libel.

But whether such a person can escape liability for the libel if he knows, or ought to know, that the newspaper is likely to contain libellous matter, *Quære*.

Appeal from the judgment of WILLS, J., at the trial of the action with a jury.

The action was brought to recover damages for an alleged libel.

The plaintiff by his statement of claim alleged that “the defendants on or about the 11th of February, 1885, at Nos. 14 and 15, Royal Exchange, in the city of London, did falsely and maliciously publish of the plaintiff in the form of an article appearing in the newspaper known as *Money*, bearing date the 11th of February, 1885, by the sale thereof by their servants or agents, at such time and places aforesaid, for the defendants’ benefit, to one Ernest Clarke,” certain words set out in the statement of claim. The plaintiff alleged that in consequence of the premises he had been and was greatly injured in his credit and reputation, and he claimed £5000 damages.

By the statement of defence (par. 1) the defendants denied that they had published the alleged libel. And further and [* 355] * alternatively (par. 2) the defendants said “that they are newsvendors, carrying on a large business at 14 and 15, Royal Exchange in the city of London, and as such newsvendors, and not otherwise, sold copies of the said periodical called *Money*, in the ordinary course of their said business, and without any knowledge of its contents, which is the alleged publication.”

The plaintiff by his reply joined issue on the first paragraph of the defence. And, as to the second paragraph of the defence, the plaintiff said “that the allegations therein contained are bad in substance and in law, on the ground that, even if the defendants

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sold copies of the said periodical without any knowledge of their contents and in the ordinary course of their business, as alleged in their defence, still, inasmuch as the defendants sold the said copies as newsvendors for reward in that behalf, the said allegations disclose no answer to the plaintiff's claim."

The action was tried on the 23rd of June, 1885, before WILLS, J., and a jury.

The jury, in answer to questions put to them by the Judge, found "that the defendants did not nor did either of them know that the newspapers at the time they sold them contained libels on the plaintiff; that it was not by negligence on the defendants' part that they did not know there was any libel in the newspaper; and that the defendants did not know that the newspaper was of such a character that it was likely to contain libellous matter, nor ought they to have known so." The Judge directed the jury to assess the damages provisionally, and they assessed them at one farthing, and the Judge then ordered judgment to be entered for the defendants, with costs.

The plaintiff did not move for a new trial, but appealed from the judgment.

The appellant in person.

The proprietor of a newspaper is liable in damages for a libel contained in it, even though the publication takes place in his absence and without his knowledge. On the same principle a man who makes a profit by the sale of a newspaper should be held liable for a libel. *Rex v. Walter*, 3 Esp. 21 (6 R. R. 808); *Rex v. Dodd*, 2 Sess. Cases, 33; *Watts v. * Fraser*, 7 C. & P. [* 356] 369; *R. v. Williams*, 26 Howells St. Tr. 653, 656; *R. v. Carlile*, 3 B. & Ald. 167, 1 Chitty, 451 (22 R. R. 338); *Day v. Bream*, 2 M. & Rob. 54; *Hooper v. Truscott*, 2 Scott, 672; Odgers on Libel, pp. 160, 161. Even a lunatic may be liable for a libel. *Mordaunt v. Mordaunt*, L. R., 2 P & D. 109 (*per* KELLY, C. B., at p. 142).

[Lord ESHER, M. R. That depends upon whether he is sane enough to know what he is doing.]

Why should a newsvendor be able to disseminate a libel without being in any way responsible for it? This would be a very dangerous doctrine. The publisher of the paper may be a man of straw or a bogus company. A grocer is liable if he sells an adulterated article, even if he has taken every care to obtain a pure article.

[Lord ESHER, M. R. In that case the liability is imposed by statute.]

If a man deals in dangerous articles he ought to be liable for any injury which is caused by them.

[BOWEN, L. J. Are you not bound to show that a newspaper is in its nature a dangerous thing ?]

There are respectable papers and there are disreputable papers. The liability would not be productive of any practical harm : the question of damages is always left to the jury, and the costs would be in the power of the Court.

Julian Robins, for the defendants, was not heard.

Lord ESHER, M. R. I am afraid it will not be much satisfaction to the plaintiff, as I am going to decide against him, for me to say that it would be impossible for any one to have argued a case in better form or with better logic than he has argued his own case. The principle is no doubt a very important one, and one well worthy of consideration. I do not intend to lay down any general rule as to what will absolve from liability for a libel persons who stand in the position of these defendants. But it is a material element in their position that the jury have found in their favour as they have done. I agree that the defendants are *prima facie* liable. They have handed to other people a * newspaper in which there is a libel on the plaintiff. I am inclined to think that this called upon the defendants to show some circumstances which absolve them from liability, not by way of privilege, but facts, which show that they did not publish the libel. We must consider what the position of the defendants was. The proprietor of a newspaper, who publishes the paper by his servants, is the publisher of it, and he is liable for the acts of his servants. The printer of the paper prints it by his servants, and therefore he is liable for a libel contained in it. But the defendants did not compose the libel on the plaintiff, they did not write it or print it ; they only disseminated that which contained the libel. The question is whether, as such disseminators, they published the libel ? If they had known what was in the paper, whether they were paid for circulating it or not, they would have published the libel, and would have been liable for so doing. That I think, cannot be doubted. But here, upon the findings of the jury, we must take it that the defendants did not know that the paper contained a libel. I am not prepared to say that it would be

sufficient for them to show that they did not know of the particular libel. But the findings of the jury make it clear that the defendants did not publish the libel. Taking the view of the jury to be right, that the defendants did not know that the paper was likely to contain a libel, and, still more, that they ought not to have known this, which must mean, that they ought not to have known it, having used reasonable care,—the case is reduced to this, that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel. That being so, I think the defendants are not liable for the libel. If they were liable, the result would be that every common carrier who carries a newspaper which contains a libel would be liable for it, even if the paper were one of which every man in England would say that it was not likely to contain a libel. To my mind the mere statement of such a result shows that the proposition from which it flows is unreasonable and unjust. The question does not depend on any statute, but on the common law, and, in my opinion, any proposition the result of which would be to show that the Common Law of England is wholly unreasonable and unjust, cannot be part of the Common * Law of Eng- [* 358] land. I think, therefore, that, upon the findings of the jury, the judgment for the defendants is right.

COTTON, L. J., concurred.

BOWEN, L. J. The jury have found as a fact that the defendants were innocent carriers of that which they did not know contained libellous matter, and which they had no reason to suppose was likely to contain libellous matter. A newspaper is not like a fire; a man may carry it about without being bound to suppose that it is likely to do an injury. It seems to me that the defendants are no more liable than any other innocent carrier of an article which he has no reason to suppose likely to be dangerous. But I by no means intend to say that the vendor of a newspaper will not be responsible for a libel contained in it, if he knows, or ought to know, that the paper is one which is likely to contain a libel.

Appeal dismissed.

ENGLISH NOTES.

Publication for the purposes of a civil action means communication of a defamatory matter to a person other than the person concerning whom it has been uttered. For instance, in a case brought by bill in the Star-Chamber, where the defendant dispatched a libellous writing

to the plaintiff in a sealed letter, the Court ruled that an action on the case would not lie because the matter was not published, but that the Star-Chamber for the King takes notice of such cases and punishes them because "such quarrellous letters tend to the breach of the peace." *Barrow v. Lewellin* (1615), Hobart, 62. "If a writing is not communicated to any one but the person of whom it is written, there is no publication of it." *Per* ESHER, M. R. in *Pullman v. Hill* (C. A., 1891) 1891, 1 Q. B. at p. 527, 60 L. J. Q. B. 299 at p. 301. But if the defendant knew or believed that the letter would be opened by another person, for instance, the plaintiff's clerk, and the letter is so opened, there is publication. *Delacroix v. Therenot* (1817), 2 Starkie, 63.

If the defendant showed the letter to his own clerk, or gave it to be type-written, *Pullman v. Hill*, *supra*; or sent a telegram containing a libel, *Whitfield v. South Eastern Railway Co.* (1858), El. Bl. & El. 115, 27 L. J. Q. B. 229; *Williamson v. Freer* (1874), L. R., 9 C. P. 393, 43 L. J. C. P. 161, 30 L. T. 332, 22 W. R. 878; or wrote the libel on a post-card, *Robinson v. Jones* (1879), 4 L. R., Ir. 391, there is sufficient evidence of publication.

Where the defendant sent a libel on A. to A.'s wife, he was held liable, *Wenman v. Ash* (1853), 13 C. B. 836, 22 L. J. C. P. 190; but where he showed it to his own wife, and to no one else, the plaintiff was nonsuited on the ground of non-publication. *Wennhak v. Morgan* (1888), 20 Q. B. D. 635, 57 L. J. Q. B. 241, 59 L. T. 28, 36 W. R. 697.

The rule in *Emmens v. Pottle* applies only in a case where the distributor of a newspaper proves as a fact that he did not know of the libellous matter, or that he could not read it. Distribution of any paper containing a libellous statement is *prima facie* evidence of publication against the distributor. *Duke of Brunswick v. Harmer* (1819), 14 Q. B. 185, 19 L. J. Q. B. 20. It is no defence that the distributor acted as the agent of another. *Maloney v. Bartley* (1812), 3 Camp. 210.

Reading out a libellous extract from a newspaper, or any document, is publication of the libel, which renders the reader liable. *John Lamb's Case* (1610), 9 Co. Rep. 60; *Forrester v. Tyrrell* (C. A. 1893), 9 Times Law Reports 257, 57 J. P. 532. So if a newspaper copies a libellous extract from another newspaper, it is a fresh publication, though the circumstance may be shown in mitigation of damages. *Saunders v. Mills* (1829), 6 Bing. 213; *Talbutt v. Clarke* (1840), 2 M. & Rob. 312.

In *Tompson v. Dashwood* (1883), 11 Q. B. D. 43, 52 L. J. Q. B. 425, 48 L. T. 943, it was ruled by a Divisional Court of the Queen's Bench Division that a communication which, if made to the person to whom

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it was intended to be made, would be privileged, is privileged although sent by a *bonâ fide* mistake to another person. But this case is overruled by the unanimous decision of the Judges of the Court of Appeal (Lord ESHER, M. R., SMITH, L. J., and DAVEY, L. J.) in *Hobditch v. Millicaine* (1894), 1894, 2 Q. B. 54, 63 L. J. Q. B. 587, 70 L. T. 826, 42 W. R. 422. There the defendant had written a letter containing libellous matter to a board of guardians in the mistaken belief that they had a public duty to perform in the matter. The Court held that no privilege attached to the occasion.

The proprietor of a newspaper is liable for all defamatory matter published in it, even though it was caused by a slip of his printer's man in setting up the type. *Shepherd v. Whitaker* (1875), L. R., 10 C. P. 502, 32 L. T. 402.

In *Colburn v. Patmore* (1840), 1 Cr. M. & R. 73, the proprietor of a journal claimed damages against the editor for inserting a libel on account of which he had been fined. The claim was ruled out of court on a technical point of pleading, but the Judges of the Court of Exchequer all concurred in the opinion that the proprietor who is himself criminally liable is not entitled to compensation from his editor who had published the libel.

The Libel Law Amendment Act 1888 (51 & 52 Vict. c. 64), ss. 5 & 6, provides that where several persons are sued in respect of the same libel, the judge may consolidate the actions, and apportion the damages awarded amongst the defendants; and that a defendant in an action for a libel may give evidence in mitigation of damages, that the plaintiff has recovered damages in another action or agreed to receive compensation for a libel to the same purport or effect.

AMERICAN NOTES.

The first principal case is cited in Newell on Defamation, pp. 245, 380; and the second at pp. 239, 728. The first principal case is cited in Townsend on Libel and Slander, sect. 115, and the second, at sect. 124.

In *Clay v. People*, 86 Illinois, 147, a newspaper reporter told the defendant he should read defendant's statement to the paper for publication; he replied, "Let them go." Held, that he was responsible for the publication. So held where a libellous article, stating that a neighbouring ticket agent was not responsible, was conspicuously posted forty days in the defendant's general office. *Fogg v. Boston, &c. R. Co.*, 148 Massachusetts, 513.

The sender of a libellous letter is liable for its further publication by the receiver if that was a probable consequence. *Miller v. Butler*, 6 Cushing (Mass.), 71; 52 Am. Dec. 768.

"Every defendant who signed the paper knowing it was intended to be printed, or who signed it and delivered it to another without knowing it would be printed, would be guilty of circulating it. Signing a libellous paper

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when it is being carried around to procure signatures, and delivering it when signed to the carrier or another person, is itself a publication of it before it is printed; and if no protest or direction against its being printed is made by the signer, and it is afterwards printed by the person to whom it is delivered, or by such person's authority, it is no defence for the signer to say that he did not intend or direct its publication." *Cotulla v. Kerr*, 74 Texas, 89; 15 Am. St. Rep. 819.

A creditor may be liable for libel in permitting libellous communications to be sent to his debtor by his agents or associates in a collecting agency, when he sets the proceeding in operation. *State v. Armstrong*, 106 Missouri, 395; 13 Lawyers' Rep. Annotated, 419; *Muetze v. Tuteur*, 77 Wisconsin, 236; 9 Lawyers' Rep. Annotated, 86.

The publisher of a newspaper is responsible for a libel therein, although he was ignorant of its publication or even expressly forbade it. *Dunn v. Hall*, 1 Carter (Indiana), 315; *Andres v. Wells*, 7 Johnson (New York), 260; 5 Am. Dec. 267; *Smith v. Ashley*, 11 Metcalf (Mass.), 367; 45 Am. Dec. 216; *Moore v. Francis*, 121 New York, 199; 18 Am. St. Rep. 810; *Detroit D. P. Co. v. McArthur*, 16 Michigan, 417; *Huff v. Bennett*, 6 New York, 337; *Lewis v. Hudson*, 11 Georgia, 572; *Commonwealth v. Willard* (Penn.), 25 Albany Law Journal, 283; *Buckley v. Knapp*, 18 Missouri, 152. But he is not liable unless he knew it was libellous; as when he supposed it was a fictitious story. *Smith v. Ashley*, *supra*; *Dexter v. Spear*, 4 Mason (U. S. Circ. Ct.), 115. And the editor may escape by showing that the publication was against his will. *Com. v. Kneeland*, Thacher (U. S. Circ. Ct.), 316.

But the innocent seller of a libellous newspaper is not liable. *Street v. Johnson*, 80 Wisconsin, 455; 27 Am. St. Rep. 42, citing *Emmens v. Pottle*, and *Smith v. Ashley*, 11 Metcalf, 367; 45 Am. Dec. 216. See note, 15 Am. St. Rep. 326.

One whose name is that of another for whom a libellous article was intended cannot maintain an action. *Hanson v. Globe Newspaper Co.*, 159 Massachusetts, 293; 20 Lawyers' Rep. Annotated, 856. But otherwise where no inquiry was made. *Weber v. Butler*, 81 Hun (New York), 244.

One who writes an article in English, and employs another person as his agent to translate it into German and publish it, will be liable if the German article so published is libellous, although the translation is inaccurate. *Wilson v. Noonan*, 27 Wisconsin, 598. (Overruled on other points, 35 *ibid.* 321.)

An action against the seller of a newspaper containing a libel is not maintainable without proof that some one read the libel. *Prescott v. Tousey*, 50 New York Superior Ct. Rep. 12.

SECTION III. — *Privilege.*

No. 4. — DAWKINS v. LORD ROKEBY.

(H. L. 1875.)

RULE.

WHERE there exists an absolute privilege, *e. g.*, such as is enjoyed by a witness giving his evidence in a judicial cause or matter, proof of actual malice will not support an action for libel or slander.

Dawkins v. Lord Rokeby.

45 L. J. Q. B. 8-14 (s. c. L. R., 7 H. L. 744; 33 L. T. 196; 23 W. R. 931).

Defamation. — Libel. — Slander. — Privileged Communication.

A military man giving evidence before a military Court of enquiry [8] which has no power to administer an oath, is entitled to the same protection as that enjoyed by a witness on oath in an ordinary judicial proceeding.

No evidence, whether written or oral, given by him in the course of the enquiry and relative to the enquiry, can be made the foundation of an action at law, however strong the presumption may be that such evidence was not only untrue but was also known to be untrue by him who gave it, or even that it was dictated by malice. For the correctness of this presumption must always be a question until resolved by a jury, and public policy requires that witnesses should give their evidence freely and openly, and without fear of being harassed by a civil action on an allegation whether true or false, that they have spoken from malice.

Where a witness before such a Court handed in a written statement voluntarily and unasked, after his examination was concluded, — *Held*, that evidence that the statements contained in such paper were untrue and were made maliciously, was wholly inadmissible.

This was a proceeding in error from a judgment of the Court of Exchequer Chamber, affirming a judgment of the Court of Queen's Bench upon a bill of exceptions to the ruling of BLACKBURN, J., at the trial of an action brought under the following circumstances : —

The action was brought in the Court of Queen's Bench by the now plaintiff in error, an officer in the army, against the defendant in error, also an officer in the army, for verbal and written statements concerning the plaintiff alleged to be defamatory, made by

the defendant, touching the plaintiff, before a military Court of enquiry. The bill of exceptions, in which is set out the plaintiff's declaration in the action, the pleadings and all the facts at large, will be found printed in the report of the case before the Court of Exchequer Chamber in 42 L. J. Q. B. 63. It is only necessary here briefly to mention the following facts: The plaintiff was, between May and July, 1860, a lieutenant-colonel in the Guards, and the defendant was a lieutenant-general, and in command of a brigade which included the Guards. During that time some unpleasantness had arisen between these officers, and the plaintiff had repeatedly asserted that the defendant had made false statements of fact to his injury. The same state of things arose afterwards, the plaintiff making similar assertions as to other officers under whose command he came. He was asked to withdraw these assertions, and on his refusal, H. R. H. the Duke of Cambridge, commanding in chief, on the 4th of February, [*9] 1865, *directed that a Court of enquiry should be held for the purpose of investigating the charges contained in the assertions made by the plaintiff against the other officers, and also to pronounce opinion upon the plaintiff's conduct generally, and his fitness for command.

By "The Queen's Regulations and Orders for the Army," section 12, a Court of enquiry may be assembled by any officer in command to assist him in arriving at a correct conclusion on any subject on which it may be expedient for him to be thoroughly informed, and such Court may be directed to investigate and report on any matter brought before it. But it has no power to administer an oath, nor can it compel the attendance of witnesses not military, and a Court of enquiry is not to be considered in any light as a judicial body.

The Court of enquiry so directed by the Duke of Cambridge to be held, met on the 10th of February, and the defendant was required to and did appear before such Court, and in the course of his examination he made several statements which the plaintiff alleged were defamatory. Moreover, after his examination was concluded, the defendant, without having been asked by the Court or any one else to do so, voluntarily handed to the Court (who received the same) a written paper containing statements which the plaintiff also alleged were libellous and defamatory.

The following are the expressions used by the defendant, Lord

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Rokeby, of which the plaintiff complained, and which were set out in the plaintiff's declaration : —

In the course of his *ricà voce* evidence before the Court, Lord Rokeby used the following expressions with regard to Lieutenant-Colonel Dawkins : —

“ I have seen him in the presence of his superior officers, and on every occasion he showed in his manner a total want of deference to their opinions, not to use a stronger term. He is not, in my opinion, always responsible for his actions, and he is unfit to command others, because he cannot command himself. I have never found one of the superior officers of Colonel Dawkins's regiment who did not state to me that during the whole service he had been constantly taking offence where none was meant, and that he was habitually disrespectful to his commanding officers. His manner on every occasion on which I saw him confirmed that opinion. My enquiries led me to conclude that Colonel Dawkins was of so captious a disposition that he was at times not responsible for his actions.”

The written paper which at the close of his examination Lord Rokeby handed in to the Court was to the following effect : —

“ On every occasion that I have seen him in the presence of his commanding officers his manner has betrayed a total want of deference, not to use a stronger term, and all reports had represented him as habitually insubordinate. I also certainly told him that unless he gained more self-command, and behaved with more respect to those under whose orders he served, I must consider him unfit for command as I did for his present position. I am still of that opinion, and I cannot think I am overstepping my duty in expressing it clearly to him. The then adjutant-general asked whether I wished the lieutenant-colonel, meaning the plaintiff, to be tried for insubordination. I answered I had only placed him under arrest, because I could not permit an officer to treat me with marked disrespect in the presence of a great many junior officers ; but that as I scarcely believed him to be responsible for his actions, I should prefer his being admonished and released. I told the former Court that which I again repeat, namely, that after a long and earnest consideration of all that has passed, I reported to his Royal Highness my conviction that the lieutenant-colonel was unfit to command.”

The act of disrespect referred to in the above paper was this :

In the presence of many officers, Lord Rokeby offered his hand to the plaintiff as he was sitting at table. The plaintiff, instead of taking Lord Rokeby's hand, rose and made him a military salute. For this Lord Rokeby placed him under arrest.

It was understood that the result of the Court of enquiry was that the plaintiff had to leave the service.

[* 10] * After the termination of the enquiry the plaintiff demanded a Court-martial on the defendant for his conduct towards the plaintiff, which was refused, and as the plaintiff could not compel such Court-martial, he brought this action. At the trial, the plaintiff's counsel proposed to prove by evidence that the verbal statements made and the written statements handed in by the defendant to the Court of enquiry were untrue, were known to the defendant to be untrue, and were made and handed in *malâ fide*, and without reasonable or probable cause. But the defendant's counsel interposed, and the learned Judge ruled and directed the jury, that "the evidence offered to be given by the plaintiff was immaterial and irrelevant, and as a matter of law the action would not lie, if the verbal and written statements were made by the defendant, being a military man, in the course of a military enquiry, in relation to the conduct of the plaintiff being a military man, and with reference to the subject of that enquiry, even though the plaintiff should prove that the defendant had acted *malâ fide* and with actual malice, and without any reasonable or probable cause, and with knowledge that the statements so made and handed in by him were false." To this ruling a bill of exceptions was tendered, which the Judge duly sealed, and on argument before the Court of Exchequer Chamber the bill was, as above mentioned, disallowed. KELLY, C. B., in giving the judgment of that Court, pointing out that the Court of enquiry was a Court duly constituted and recognised by the Articles of War and in Acts of Parliament, and that it followed from the section which provided that such Court should have no power to compel the attendance of witnesses not military, that a military witness was compellable to attend and give evidence, under peril of dismissal, at the will of the Sovereign, in case of disobedience; that such a witness was therefore entitled to the same protection and immunity as any witness in any of the Courts of law or equity; that as a false witness in a Court of law or equity is indictable for perjury, so a witness going out of his way to slander another person before a

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Court of enquiry, may be put upon his trial before a Court-martial; that in either case the indictment may be rejected or the Court-martial refused, if no sufficient grounds for its being granted are shown; and that in no case ought a witness to be liable to an action at law for damages should his evidence reflect on the character of another, if he is also liable to heavy punishment should he refuse to appear as a witness at all.

From this judgment the plaintiff now brought error to this House.

The Judges were summoned, and BLACKBURN, J., MELLOR, J., BRETT, J., GROVE, J., and POLLOCK, B., attended.

H. Matthews and Holl, for the appellant. — The grounds upon which Judges and jurors are by the policy of the law absolutely privileged from all proceeding, civil or criminal, — namely, that it is essential to secure their entire freedom in the execution of their duty, do not apply to prosecutors, or to parties to actions, or to witnesses. Prosecutors and parties to actions who act *malâ fide* and without probable cause are liable in an action by the party injured for such malicious prosecution or action, and witnesses are liable to be indicted for perjury, or for conspiracy where two or more combine; and there is no sufficient reason why witnesses giving evidence *malâ fide*, without reasonable or probable cause, and which they know to be false, should not be responsible for the injury they thereby occasion. It is said that the testimony given by a witness is a privileged communication, and that on that ground evidence is inadmissible to show what was the motive with which it was given; but the privilege is removed when it is shown that the communication was made *malâ fide*. In *Dickson v. Lord Wilton*, 1 Fost. & F. 419, Lord CAMPBELL, C. J., held that though the letters and conversation complained of in that action being communications made to a commanding officer were privileged, yet evidence was admissible to show that the letters were written from personal * resentment. So too in *Dickson v. Lord Comber-* [* 11] *mere*, 3 Fost. & F. 527, the question left by COCKBURN, C. J., to the jury was whether the defendant had acted honestly and *bona fide*, or from a bad or improper motive. In *Keighly v. Bell*, 4 Fost. & F. 763, which was an action against a superior officer for false imprisonment, WILLES, J., left to the jury the question whether the arrest was in the ordinary discharge of military duty or without reasonable or probable cause, although the arrest, being

a matter of military discipline, would not otherwise have been cognisable by a Court of law. *Dawkins v. Lord Rokeby*, 4 Fost. & F. 806, is to the same effect, although the direction of WILLES, J., in that case was against the plaintiff on the ground of the strong expressions of opinion given by Lord MANSFIELD in *The King v. Skinner*, Loft. 55, and *Sutton v. Johnstone*, 1 T. R. 493 (1 R. R. 257); affirmed in House of Lords, 1 T. R. 784 (1 R. C. 765). That case and also the two actions of *Warden v. Bailey*, first in the Common Pleas, 4 Taunt. 67 (13 R. R. 560), and afterwards in the Court of Queen's Bench, *Bailey v. Warden*, 4 M. & S. 400 (16 R. R. 502), are discussed by COCKBURN, C. J., in *Dawkins v. Lord F. Paulet*, 9 P. & S. 768, 39 L. J. Q. B. 53 (in error, 10 B. & S. 972), when his Lordship expressed himself of opinion that the reports of the plaintiff's superior officer to the Adjutant-General afforded ground for an action for libel if they were made of actual malice and without reasonable or probable cause, though made in discharge of military duty.

Whether the defendant can or cannot be called to account for what he actually said in answer to the questions put to him when before the Court of enquiry, he must surely be responsible for the libellous statements contained in the paper, which, after the close of his examination, he voluntarily, and without being asked by anybody, handed into the Court. As to that paper he cannot claim protection on the ground that he was open to punishment if he had not handed it in. It is clear that the defendant went out of his way to make those statements, and whatever may be the privileges of a witness before a military Court of enquiry, they cannot exceed the privileges of a witness in a Court of law. The thing was not done in time of war. There was no public necessity for his making those statements, and there is nothing in the case which a jury is not as capable of giving an opinion upon as any military tribunal. As the plaintiff has been refused a Court-martial there is good reason why he should be allowed to take the opinion of a jury. We say that a witness before a Court, such as this Court was, would have no greater immunities than such as attach to witnesses before Courts of record. But their immunities are not so extensive. There is a large difference in this particular between Courts of record and other Courts, *Hawkins' Pleas of the Crown*, Book 1, c. 72, ss. 5, 6; c. 73, ss. 8, 9; *Floyd v. Barker*, 12 Co. Rep. 23; and it is clear that a witness giving his evidence upon his oath, and there-

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fore liable to an indictment for perjury, is not in the same position as a witness before a Court of enquiry, which is neither a judicial body nor capable of administering an oath, — a witness therefore against whom the injured party has no remedy by any criminal proceedings.

But take as granted that a Judge of a military Court of enquiry, or of a Court-martial, has the same privilege as a Judge of a Court of record. Still Judges, jurors, witnesses and counsel have their privileges, but these are not all the same, for Judges and jurors have absolute privileges, counsel and witnesses have not. *Gates v. Lancing*, 5 Johnson's Amer. Rep. 282, at p. 291. An action formerly lay against a witness for false affidavit, *Case of False Affidavits*, 12 Co. Rep. 128; an information will lie for perjury, * *Anonymous Case*, 3 Dyer, 288 a; any one injured [*12] by perjury may bring an action, 5 Eliz. c. 9. In *Damport v. Simpson*, Cro. Eliz. 520, the action was not allowed because the witness is not to be twice punished, once civilly and again criminally. *Coxe v. Smith*, 1 Levinz, 119, shows that the action is not founded on the oath, but because it was maliciously done. In *Savil v. Roberts*, 1 Salk. 13, 1 Ld. Raym. 374, Carth. 416, 5 Mod. Rep. 394, 405, an action was allowed for malicious prosecution. In *Cotterell v. Jones*, 21 L. J. C. P. 2, 11 C. B. 717, an action for malicious prosecution was not allowed, because there was no allegation that legal damage had been sustained beyond what the award of costs of the prosecution would sufficiently compensate or punish. In *Eyres v. Sedgewicke*, Cro. Jac. 601, an action for false oath in a Court of justice was not allowed on the ground that every Court shall have power to deal with misdemeanours committed in its own Court. But in the case of this plaintiff the Court of enquiry had no power to deal with the misdemeanour committed by the defendant before it, and "if the witness is not liable criminally, he is liable civilly." *Revis v. Smith*, 25 L. J. C. P. 195, 18 C. B. 196. In that case the action was held not to lie, because the witness believed what he said was true, and there was no averment of malice. In *Daniels v. Fielding*, 16 M. & W. 200, 16 L. J. Ex. 153, which was an action for occasioning the plaintiff's arrest by false affidavit, there was proof adduced that the defendant thought he had reasonable and probable cause to occasion the arrest. BOVILL, C. J., said that the foundation on which such an action rests is that the party obtaining the arrest has imposed on the Judge. *Hender-*

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son v. Broomhead, 4 Hurl. & N. 569, 28 L. J. Ex. 360, is the first case which goes the whole length of the proposition asserted on behalf of the defendant. That case was founded on *Astley v. Younge*, 2 Burr. 807, and is not in accordance with general law, and in no other system of law is this absolute privilege of the witness admitted. Cod. Rom. Book IV. It has been held that where distinct malice is proved even a Judge would not be exempt, *Kendillon v. Maltby*, Car. & M. 402; and in *Thomas v. Chirton*, 2 B. & S. 475, 31 L. J. Q. B. 139, Cockburn, C. J., laid it down that a coroner might be liable for defamatory language used by him without reasonable or probable cause. The question is one of *animus*, *Home v. Bentinck*, 2 Brod. & Bing. 130, 8 Price 225 (22 R. R. 748); "of malice," *Jekyll v. Sir J. Moore*, 2 Bos. & P. (N. R.) 341, 6 Esp. 63. It is well settled that there is no power in the Sovereign to create fresh Courts. This Court of enquiry, therefore, could not be, and it is expressly provided by the Queen's Regulations that it shall not be, in any sense, a Court of justice, and even if the officers composing the Court be *sub modo* Judges, and so exempt from civil action, yet, as no oath was administered by that Court, the exemptions would not extend to a witness speaking falsely and maliciously before it, and even if a witness should be exempt, and the defendant should be excused for the words he uttered in that character, yet part of our complaint is in respect of what he did, not in that character, but after his examination was closed: and with the close of his examination his position as a witness ceased.

Bulwer, C. Bowen and Fitzmaurice, for the defendant, were not called upon to argue.

At the conclusion of the argument the following question was submitted to the Judges: Whether the opinion and ruling [* 13] of the learned Judge in this case, as * stated in paragraph 15 of the bill of exceptions, and his direction thereupon to the jury, were right in point of law?

The opinion of the Judges was delivered by —

KELLY, C. B. We are unanimously of opinion that the question put to us by your Lordships must be answered in the affirmative.

A long series of decisions have settled that no action will lie against a witness for what he says or writes in giving evidence before a Court of justice. This does not proceed on the ground that the occasion rebuts the *prima facie* presumption that words

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disparaging to another are maliciously spoken or written. If this were all, evidence of express malice would remove this ground. But the principle we apprehend is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice. The authorities as regards witnesses in the ordinary Courts of justice are numerous and uniform. In the present case it appears in the bill of exceptions that the words and writing complained of were published by the defendant, a military man bound to appear and give testimony before a Court of enquiry. All that he said and wrote had reference to that enquiry; and we can see no reason why public policy should not equally prevent an action being brought against such a witness as against one giving evidence in an ordinary Court of justice.

The LORD CHANCELLOR (LORD CAIRNS). MR. JUSTICE BLACKBURN, on the occasion of the trial, is stated by the bill of exceptions to have declared his opinion to be "that the said evidence so offered to be given by the plaintiff as aforesaid was immaterial and irrelevant, and that as a matter of law the action would not lie if the verbal and written statements were made by the defendant, being a military man, in the course of a military enquiry in relation to the conduct of the plaintiff, being a military man, and with reference to the subject of that enquiry, even though the plaintiff should prove that the defendant had acted *malâ fide*, and with actual malice and without any reasonable or probable cause, and with a knowledge that the statements so made and handed in by him as aforesaid were false; and then directed the said jury that, under the circumstances so stated and admitted as above set forth, as a matter of law the action would not lie, even though the plaintiff should prove that the defendant had acted *malâ fide* and with actual malice and without any reasonable or probable cause, and with a knowledge that the statements so made and handed in by him as aforesaid were false. And the jurors aforesaid by and under the direction of the said justice then gave their verdict for the defendant upon the said issue."

I think it is of great importance that your Lordships should bear in mind these precise expressions which I have now read, because I feel sure that your Lordships would not desire your decision upon the present occasion to go further than the circumstances of this particular case would warrant. The leading facts which are

put in prominence by the learned Judge are these: The statements were made by the defendant, who was a military man; the enquiry was a military enquiry; the statements were made in relation to the conduct of the plaintiff as a military man; and were made with reference to the subject of that enquiry. I say this more particularly because an argument was addressed to your Lordships to show that the enquiry in question was not to be considered in the light of a judicial enquiry, and the evidence was not evidence given by a witness on oath. That is quite true, but at the same time your Lordships have it in the bill of exceptions that it was an enquiry connected with the discipline of the army; it was an enquiry warranted by the Queen's regulations and orders for the army; it was called by the Field Marshal commanding-in-chief, in pursuance of those regulations, and the defendant in the action was called before that enquiry as a witness, as a person who was required to make statements relevant to the enquiry which was then [*14] being conducted, and it * was in the course of that enquiry that those statements were made.

Now, adopting the expressions of the learned Judges with regard to what I take to be the settled law as to the protection of witnesses in judicial proceedings, I certainly am of opinion that upon all principles, and certainly upon all considerations of convenience and of public policy, the same protection which is extended to a witness in a judicial proceeding who has been examined on oath, ought to be extended, and must be extended, to a military man who is called before a Court of enquiry of this kind for the purpose of testifying thereupon a matter of military discipline connected with the army. It is not denied that the statements which he made, both those which were made *vis à voce*, and those which were made in writing, were relative to that enquiry. Under those circumstances, I submit to your Lordships that the conclusion of the learned Judges is in all respects one which we ought to adopt, and that your Lordships will hold that statements made under these particular circumstances are statements which cannot become the foundation of an action at law.

I therefore move your Lordships, that the judgment of the Court of Exchequer Chamber be affirmed, and this appeal dismissed with costs.

Lord CHELMSFORD and Lord HATHERLEY concurred.

LORD PENZANCE. I also agree in the view which has been

stated, but I wish to say one word on the supposed hardship of the law, which is brought into question by the appeal.

It is said that a statement in effect of a libellous nature, which is palpably untrue, known to be untrue by him who made it, and dictated by malice, ought to be the subject of a civil remedy, though made in the course of a purely military enquiry. This mode of stating the question assumes the untruth, and assumes the malice. If by any process of demonstration free from the defects of human judgment the untruth and malice could be set above and beyond all question or doubt, there might be ground for contending that the law of the land should give damages to the injured man.

But this is not the state of things under which this question of law has to be determined. Whether the statements were in fact untrue, and whether they were dictated by malice, are, and always will be, open questions upon which opinions may differ, and which can only be resolved by the exercise of human judgment. And the real question is whether it is proper on grounds of public policy to remit such questions to the judgment of a jury. The reasons against doing so are simple and obvious. A witness may be utterly free from malice, and may yet in the eyes of a jury be open to that imputation, or again, the witness may be cleared by the jury of the imputation, and may yet have had to encounter the expenses and distress of a harassing litigation. With such possibilities hanging over his head, a witness cannot be expected to speak with that free and open mind which the administration of justice demands.

These considerations have long since led to the legal doctrine that a witness in the Courts of law is free from any action, and I fail to perceive any reason why the same considerations should not be applied to an enquiry such as the present and with the same result.

Lord O'HAGAN and Lord SELBORNE concurred.

*Judgment of the Court of Exchequer Chamber affirmed;
and appeal dismissed with costs.*

ENGLISH NOTES.

The principal case was followed in *Dawkins v. Prince Edward of Saxe Weimar* (1876), 1 Q. B. D. 499, 45 L. J. Q. B. 567, 35 L. T. 323, 24 W. R. 670. The plaintiff brought three actions charging the defendants in each with conspiracy to make a false statement to the

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Commander in Chief that the plaintiff was unfit to command his regiment. The defendants took out a summons for stay of proceedings on the ground that they were members of a Military Court of enquiry and that the statements complained of were made in the discharge of their duties as such members. These statements being uncontradicted the proceedings were stayed.

Cases of absolute privilege may be classed as follows:—

1. *Proceedings in either of the Houses of Parliament.*

For instance, a petition to Parliament, or to a Committee of Parliament. *Lake v. King* (1680), 1 Saund. 131; *Kane v. Mulraney* (1866), 2 Ir. Rep. C. L. 402; or evidence given before or statement made in a Select Committee of the Houses of Parliament. *Goffin v. Dounelly* (1881), 6 Q. B. D. 307, 50 L. J. Q. B. 303, 44 L. T. 141, 29 W. R. 440.

In *Stockdale v. Hansard* (1839), 9 Ad. & El. 1, 2 P. & D. 1, 7 C. & P. 731, 2 M. & Rob. 9, the Court of Queen's Bench decided that a report of proceedings in the House of Commons, containing a libellous statement, was not privileged, though published by the Order of the House. The Statute 3 & 4 Viet. c. 9 has however overridden this decision.

The privilege attached to speeches, &c., made in one of the Houses of Parliament does not attach to the publication by a Member of Parliament, without the authority of the House, of a speech made by him in the House containing libellous matter, although such publication was due to the fact that the speech of the defendant had been misreported in a newspaper, or misrepresented. *Rex v. Abingdon* (1791), 1 Esp. 224, 5 R. R. 733; *Rex v. Creevey* (1813), 1 M. & S. 273, 14 R. R. 427. The case is distinguished in *Wason v. Walter* (1868), L. R., 4 Q. B. 73, 38 L. J. Q. B. 34, 39, 19 L. T. 409, 17 W. R. 169, 8 B. & S. 671, from the case where a newspaper for the information of the public makes a faithful report of a debate in Parliament. See notes to Nos. 5 & 6, p. 74, *post*.

2. *Proceedings in a Court of Justice.*

For instance, no action lies against a judge of a Superior Court for anything said or done by him while sitting as a judge however maliciously it may be done. *Floyd v. Barker* (1608), 12 Co. Rep. 24; *Ex parte Fernandez* (1861), 10 C. B. (N. S.) 3, 30 L. J. C. P. 321, 4 L. T. 321, 9 W. R. 832; *Scott v. Stangfield* (1868), L. R., 3 Ex. 220, 37 L. J. Ex. 155, 18 L. T. 572, 16 W. R. 911; *Anderson v. Gorrie* (1891), 1895, 1 Q. B. 668, 71 L. T. 382.

A judge of an inferior Court is privileged only when he said or did the thing complained of in a case which was within the jurisdiction of the Court, or where he had reason to believe a state of facts which gave

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him jurisdiction. *Calder v. Halkett* (1839), 3 Moo. P. C. 28; *Houlden v. Smith* (1850), 14 Q. B. 841, 19 L. J. Q. B. 170.

Words spoken by a justice of the peace are privileged unless they were spoken maliciously, and without reasonable and probable cause, and had no connection with the matter in issue. *Kirby v. Simpson* (1834), 10 Ex. 358, 23 L. J. M. C. 165; *Gelen v. Hall* (1857), 2 H. & N. 379, 27 L. J. M. C. 78.

The privilege attached to judicial proceedings applies only to proceedings before a body which is strictly recognized as judicial. Proceedings before other investigating bodies, though of a judicial nature, are not absolutely privileged. The Licensing Committee of the London County Council is not a judicial body. Hence, if a member, on a petition for the grant or renewal of a Music Hall license, makes a slanderous statement against the petitioner, falsely and maliciously, knowing that it was false, or reckless whether it were true or not, it is not privileged. *Royal Aquarium Society v. Parkinson* (C. A. 1892), 1892, 1 Q. B. 431, 61 L. J. Q. B. 409, 66 L. T. 513, 40 W. R. 450.

In regard to the privilege of an advocate conducting a cause for a client in a judicial proceeding, it was laid down at an early date "that a counsellor hath a privilege to enforce anything that is informed unto him for his client, and to give it in evidence, it being pertinent in the matter in question, and not to examine whether it be true or false." *Brook v. Sir Henry Montague*, Cro. Jac. 90. This was followed in a case against an eminent barrister, *Hodgson v. Scarlett* (1818), 1 B. & Ald. 232, 19 R. R. 301. Modern cases have gone further, and the law has been laid down by the Judges of the Court of Appeal (BRETT, M. R. and FRY, L. J.) in affirming a judgment of the Queen's Bench, that the words of an advocate while conducting a case for his client are absolutely privileged even although irrelevant and spoken maliciously and without reasonable cause. *Munster v. Lamb*, No. 2 of "Counsel," 7 R. C. 714.

The testimony of witnesses in a judicial proceeding is also absolutely privileged, provided the words spoken by a witness refer in some way to the enquiry the Court is engaged in. *Trotman v. Dunn* (1815), 4 Camp. 211; *Lynnam v. Gowing* (1880), 6 L. R., Ir. 259. This was held to apply, where a witness, after his cross-examination, volunteered a statement of opinion by way of vindicating his credit, which involved a criminal accusation against a person wholly unconnected with the case. *Seaman v. Netherclift* (C. A. 1876), 2 C. P. D. 53, 46 L. J. C. P. 128, 35 L. T. 784, 25 W. R. 159.

The same privilege is accorded to the statements in an affidavit made in the due course of a judicial proceeding. *Revis v. Smith* (1856), 18 C. B. 126, 25 L. J. C. P. 195; *Henderson v. Broomhead* (1859), 4 H.

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& N. 569, 28 L. J. Ex. 360, 5 Jur. N. S. 1175, 33 L. T. (o. s) 302. If the matter is false and relevant to the issue, the only remedy is a prosecution for perjury. The case might be different if some libellous and wholly irrelevant matter (which of course would be liable to be expunged for scandal) was maliciously inserted; but it would, at all events be necessary for the plaintiff to show the irrelevancy. See *per ERLE, C. J., Henderson v. Broomhead, supra*.

The observation of a juror is absolutely privileged. *Res v. Skinner* (1772), Lofft. 55.

3. *Proceedings before a naval or military Court.*

See *Dawkins v. Lord Rokeby*; *Dawkins v. Prince Edward of Saxe Weimar, supra*. In *Dawkins v. Paulet* (1870), L. R., 5 Q. B. 94, 39 L. J. Q. B. 53, 21 L. T. 584, 18 W. R. 336, 9 B. & S. 768, the defendant was the military superior officer of the plaintiff. It was his duty as such superior officer to forward to the Adjutant-General letters written by the officers under his command and sent to him in relation to their military conduct, and to make reports in writing to the Adjutant-General upon such letters, for the information of the Commander in Chief. The defendant received some letters from the plaintiff, and forwarded them in the ordinary course of military duty to the Adjutant-General, and made certain reports in writing. The plaintiff sued in respect of the libellous character of the reports. The defence was privilege, to which the plaintiff replied that the report was made maliciously, without reasonable and probable cause, and not in *bonâ fide* discharge of the defendant's duty as superior military officer. MELLOR, J., and LUSH, J. (COCKBURN, C. J., dissenting), held that even though the words complained of were published maliciously and without reasonable, probable or justifiable cause as alleged in the reply, yet that, inasmuch as the question raised was one purely of military cognisance, the plaintiff had no remedy at law.

4. *Communications as to Matters of State made by one Officer of State to another in the course of his official duty.*

Chatterton v. Secretary of State for India (C. A. 1895), 1895, 2 Q. B. 189, 64 L. J. Q. B. 677, 72 L. T. 858.

AMERICAN NOTES.

No action lies against a witness for words spoken in testimony, if pertinent, although malicious. *Calkins v. Sumner*, 13 Wisconsin, 193; 80 Am. Dec. 738; *Barnes v. McCrate*, 32 Maine, 442; *Perkins v. Mitchell*, 31 Barbour (New York), 161; *Lewis v. Few*, 5 Johnson (New York), 13; *Nelson v. Robe*, 6 Blackford (Indiana), 204; *Vernier v. Vernier*, 64 Mississippi, 321; *Stewart v. Hall*, 83 Kentucky, 375; *Hutchinson v. Lewis*, 75 Indiana, 55; *Liles v. Gaster*, 42 Ohio State, 631; *Nissen v. Cramer*, 104 North Carolina, 574; 6 Lawyers'

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Rep. Annotated, 780; *Cooper v. Phipps*, 24 Oregon, 357; 22 Lawyers' Rep. Annotated, 836; citing the principal case.

In *Perkins v. Mitchell*, *supra*, the Court said: "In the course of judicial proceedings, which is all that is material now, words spoken or written by a party, by counsel, by a judge, a juror, or a witness, although false, defamatory, and malicious, are not actionable if they were uttered in the due course of the proceeding, in the discharge of a duty, or the prosecution of defence of a right, and were pertinent and material to the matter in hand." Citing English and New York cases. "These cases leave no room to doubt that in England and in the Courts of this State, the rule has been very steadily adhered to which protects parties and witnesses for statements pertinently made by them in the assertion of their rights or the discharge of their duties at such."

But if the testimony is false, irrelevant, and malicious, it is not privileged.

"But a remark made by a witness while on the stand, wholly irrelevant to the matter of inquiry, uncalled for by any question of counsel, and introduced by him maliciously for his own purposes, and observations made while waiting about the Court before or after he has given his evidence, are not privileged." Newell on Defamation, sect. 13; *Barnes v. McCrate*, 32 Maine, 442; *Calkins v. Summer*, 13 Wisconsin, 193; *Grove v. Brandenburg*, 7 Blackford (Indiana), 234; *Smith v. Howard*, 28 Iowa, 51.

In *White v. Carroll*, 42 New York, 161; 1 Am. Rep. 503, the witness being asked if a physician attended on a certain occasion, "Not as I know of; I understand he had a quack; I would not call him a physician." It was left to a jury to say whether this was malicious, and a judgment for plaintiff in slander was sustained.

In *Shadden v. McElree*, 86 Tennessee, 146; 6 Am. St. Rep. 821, the words sued for and uttered in testimony charged the plaintiff with having stolen the defendant's horse. The doctrine of the last case was adopted, the Court observing: "We recognize fully the importance to a due administration of justice of upholding the privilege accorded to parties to write and speak freely in judicial proceedings; but in so doing we must not lose sight of the fact that it concerns the peace of society that the good name and repute of the citizen shall not be exposed to the malice of individuals, who, under the supposed protection of an absolute privilege, make use of the witness box to volunteer defamatory matter in utterances not pertinent. To hold such persons responsible in damages cannot fairly be said to hamper the administration of justice. The privilege of a witness is great, and will be protected in all proper cases, but it must not be mistaken for unbridled license."

"The true rule, in other words, is that what was said pertinent and material to the matter in controversy being privileged, the legal idea of malice is excluded; but if not pertinent, and not uttered *bonâ fide*, but for the purposes of defaming plaintiff, protection cannot be claimed, and defendant would be answerable." *Smith v. Howard*, 28 Iowa, 51.

"It seems to be the settled doctrine of the English Courts that statements made by a witness in the course of a judicial investigation are absolutely privileged, to that extent that no action of libel or slander will lie therefor. In this country, many, and perhaps a majority of the Courts have refused to

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adopt the absolute and unqualified privilege of the witness as laid down by the English Courts; but it is agreed that a witness is absolutely privileged as to everything said by him having relation or reference to the subject-matter of inquiry before the Court, or in response to questions asked by counsel, and presumptively so as to all his statements. But some of the cases hold that if he abuse his privilege by making false statements, which he knows to be impertinent or immaterial and not responsive to questions propounded to him, for the purpose of malicious defamation, he may, upon an affirmative showing to that effect, be held in damages for libel or slander." *Cooper v. Phipps, supra*. This is sustained by *Rice v. Coolidge*, 121 Massachusetts, 393; 23 Am. Rep. 279, citing the principal case; and precisely to this effect, *obiter*, *Blakeslee v. Carroll*, 61 Connecticut, 223; 25 Lawyers' Rep. Annotated, 106 (an inquiry before an aldermanic committee), citing the principal case.

In *Hunkel v. Voneiff*, 69 Maryland, 179; 9 Am. St. Rep. 413, the witness, being asked to fix a date, answered: "Not knowing that a mistress or woman of Mr. Pitt would step in to claim the property, I did not keep an account of the date that way." This was held not to be so wholly foreign to the case as to be actionable. The Court learnedly review the English authorities, including the principal case, and *Munster v. Lamb*, 11 Q. B. Div. 588 (*ante*, vol. 7, p. 711); they quote Mr. Townshend to the effect that a witness is not liable "except for wilfully false statements;" and Judge Cooley to the effect that the witness's statements are "absolutely privileged," and "no inquiry into motives is permitted in an action of slander or libel" (Constitutional Limitations, 515; and the authority (such as it is) of Mr. Wait (Actions and Defences,) 138) adopting the English rule; and conclude: "A different view as to the extent of the privilege has been taken by the Courts of many of the States; and it may be conceded that the weight of authority in this country is in favor of a much greater restriction upon the privilege than is sanctioned by the English decisions. But we are not controlled by any decision of our own Courts, and are at liberty to settle the law for this State according to our best judgment. After a most careful consideration of the subject, we are convinced that the privilege of a witness should be as absolute as it has been decided to be by the English authorities we have cited, and we accordingly adopt the law on this subject as they have laid it down." Two Judges dissented, one observing: "The absolute and unqualified privilege of a witness, as laid down in this case, is in my opinion a departure from the well-settled law on the subject. I agree that a witness is absolutely protected as to everything said by him, having relation or reference to the subject-matter of inquiry before the Court. But if he takes advantage of his position as a witness to assail wantonly the character of another, and to utter maliciously what he knows to be false in regard to a matter that has no relation or reference to the matter of inquiry, he is in my opinion, both on principle and authority, liable in an action of slander."

Mr. Townshend, in the last edition of his treatise on Libel and Slander, sect. 223, cites the doctrine of the New York, Iowa, Maine, and Tennessee Courts, and adds: "We cannot concur in that view. The due administration of justice requires that the witness should speak according to his belief, the

 No. 5. — *Toogood v. Spyring*, 1 Cr. M. & R. 181. — Rule.

truth, the whole truth, and nothing but the truth, without regard to the consequences; and he should be encouraged to do this by the consciousness that except for any wilfully false statement, which is perjury, no matter that his testimony may in fact be untrue, or that loss to another ensues by reason of his testimony, no action of slander can be maintained against him." Citing the principal case. "It is not simply a matter between individuals, it concerns the administration of justice. The witness speaks in the hearing and under the control of the Court, is compelled to speak with no right to decide what is material or immaterial; and he should not be subject to the possibility of an action for his words. This is the view in the Courts of England and some of the States, and in our opinion is the correct view."

No. 5. — *TOOGOOD v. SPYRING.*

(EX. 1834.)

No. 6. — *HEMMINGS v. GASSON.*

(Q. B. 1858.)

RULE.

A COMMUNICATION fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned, is privileged to the effect that no action can, in the absence of proof of malice, be maintained in respect of the statements contained in the communication.

Evidence of statements made by the defendant subsequently to the libel, is admissible for the purpose of showing malice at the time of publication of the libel.

Toogood v. Spyring.

1 Crompton, Meeson, & Roscoe, 181-195 (s. c. 3 L. J. Ex. 347; 4 Tyr. 582).

Defamation. — Slander. — Privileged Communication. [181]

A., the tenant of a farm, required some repairs to be done at the farm house, and B., the agent of the landlord, directed C. to do the work. C. did it, but in a negligent manner, and during the progress of it, got drunk; and some circumstances occurred which induced A. to believe that C. had broken open his cellar door and obtained access to his cyder. A., two days afterwards, met C. in the presence of D., and charged him with having broken his cellar door, and with

having got drunk and spoilt the work. A. afterwards told D., in the absence of C., that he was confident C. had broken open the door.—On the same day A. complained to B. that C. had been negligent in his work, had got drunk, and he thought he had broken open his cellar door:—*Held*, that the complaint to B. was a privileged communication, if made *bonâ fide*, and without any malicious intention to injure C.:—*Held* also, that the statement made to C. in the presence of D. was also privileged, if done honestly and *bonâ fide*; and that the circumstance of its being made in the presence of a third person does not of itself make it unauthorized, and that it was a question to be left to the jury to determine from the circumstances, including the style and character of the language used, whether A. acted *bonâ fide*, or was influenced by malicious motives:—*Held* also, that the statement to D., in the absence of C., was unauthorized and officious, and therefore not protected, although made in the belief of its truth, if it were in point of fact false.

Slander.—The first count of the declaration stated that the plaintiff, at the time of committing the grievances thereafter mentioned, was a journeyman carpenter, and accustomed to employ himself as a journeyman carpenter, and gain his living by that employment, and had been, and was at the time of committing the grievances, &c., retained and employed by, and in the service of, one James Brinsdon, as his journeyman carpenter and workman, at and for certain wages and rewards by the said James Brinsdon to him to be paid in that behalf; and in that capacity and character had always behaved and conducted himself with honesty, sobriety, and great industry and decorum, and never was, nor, until the time of committing the grievances, was suspected to have been or to be, dishonest, drunken, dissolute, vicious, or lazy, to wit, in the county aforesaid; by means of which said several premises he had not only acquired the good opinion of his neighbours and divers other good and worthy subjects, &c., and especially the high esteem of his masters and employers, but had also derived and acquired for himself divers great gains, &c. That the plaintiff, at the time of committing the grievances in the first, second, and last counts mentioned, had been employed by the said James Brinsdon, as his workman and journeyman, in and upon certain work, to wit, on and about certain premises of the defendant, and then and there, upon and throughout that occasion, and during the whole of his the plaintiff's work in and about the same, had behaved [182] and conducted *himself with honesty, sobriety, and great industry and decorum, and in a proper and workmanlike manner; yet, the defendant, well knowing, &c., but contriving, &c.,

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and to cause it to be suspected and believed that the plaintiff had been and was guilty of the offences and misconduct thereafter stated, to have been charged upon and imputed to him by the defendant, theretofore, to wit, on the 9th of January, 1834, in the county aforesaid, in a certain discourse which the defendant then and there had with the plaintiff of and concerning the plaintiff, and of and concerning him with reference and in relation to the aforesaid work, in the presence and hearing of divers worthy subjects, &c.; then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published to and of and concerning the plaintiff, and of and concerning him with reference and in relation to the aforesaid work, the false, scandalous, malicious, and defamatory words following, that is to say, — “What a d——d pretty piece of work you (meaning the plaintiff) did at my house the other day.” And in answer to the following question, then and there, in the presence and hearing of the said last-mentioned subjects, put by the plaintiff to the defendant, that is to say, — “What, Sir!” — then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously answered, spoke, and addressed to, and published of and concerning the plaintiff, and of and concerning him in relation and with reference to the aforesaid work, these other false, scandalous, malicious, and defamatory words following, that is to say, — “You broke open my cellar door, and got drunk, and spoiled the job you were about” (meaning the aforesaid work).

The words, as stated in the second count, were, — “He broke open my cellar door, and got drunk, and spoiled the job he was about.”

In the third: That in answer to an assertion of the plaintiff that he had never broken into or entered the * defend- [* 183] ant's cellar, the defendant said, — “What! I will swear it and so will my three men.”

The fourth count stated, that on &c., in a certain other discourse which the defendant then and there had with a certain other person, to wit, one Richard Taylor, of and concerning the plaintiff, in the presence and hearing of the said last-mentioned person, and of divers other good and worthy subjects, &c., and in answer to a certain question, whereby the last-mentioned person, to wit, the said Richard Taylor, did then and there, in the presence and hearing of the other last-mentioned subjects, interrogate and ask of the defend-

ant, whether he, the defendant, meant to say that the plaintiff had broken into the cellar of the defendant, he, the defendant, then and there, in the presence and hearing of the last-mentioned subjects, falsely and maliciously answered, spoke, and published to the last-mentioned person, to wit, the said Richard Taylor, in his presence and hearing, these other false, scandalous, malicious, and defamatory words following, of and concerning the plaintiff, that is to say, — “I” (meaning the defendant) “am sure he” (meaning the plaintiff) “did” (meaning that the plaintiff had broken into his the defendant’s cellar); “and my” (meaning the defendant’s) “people will swear it.”

The words in the fifth count were alleged to be spoken generally, as in the first three, and not to any particular individual; and they were these: “You got drunk, and spoiled the job you were about” (meaning the aforesaid work). The declaration then alleged, that, by reason of the committing of the grievances, he, the plaintiff, was greatly injured in his good name, fame, character, occupation, and credit, and brought into public scandal, &c., insomuch that divers of those neighbours and subjects, to whom the innocence and integrity of the plaintiff in the premises were unknown, have, on account of the committing of the said grievances by the defendant

as aforesaid, from thence hitherto suspected and believed [* 184] and * still do suspect and believe him to have been and

to be a person guilty of the offences and misconduct so as aforesaid charged upon and imputed to him by the defendant; and have, by reason of the committing of the said grievances by the defendant as aforesaid, from thence hitherto wholly refused and still do refuse to have any transaction, acquaintance, or discourse with the plaintiff, as they were before used and accustomed to have, and otherwise would have had; and also by means of the premises the said James Brinsdon, who before and at the time of the committing of the said grievances had retained and employed and otherwise would have continued to retain and employ the plaintiff as his journeyman, workman, and servant for certain wages and reward, to be therefore paid to the plaintiff, afterwards, to wit, on the day and year aforesaid, in the county aforesaid, discharged the plaintiff from his service and employ, and wholly refused to retain and employ the plaintiff in his said service and employ; and the plaintiff hath from thence hitherto wholly, by means of the premises, and from no other cause whatever, remained and continued and still is out of employ, &c.

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The defendant pleaded, — first, the general issue ; secondly, that, before the committing of the grievances, to wit, on the 7th January, 1834, the said plaintiff broke open a door of a cellar of the said defendant, in a house of the said defendant, and then and there broke into the said cellar, and got drunk, and spoiled the said work in the introductory part of the said declaration mentioned ; wherefore he the said defendant did speak and publish the said words, as in the said declaration respectively mentioned, of and concerning and relating to the said house and the said cellar door, as he lawfully might for the cause aforesaid. And this, &c. Thirdly, as to the first, second, and last counts, and as to the speaking and publishing of the following words, that is to say, — “ I am sure he ” (meaning the plaintiff) “ did,” (meaning that the said plaintiff had broken into * his the said defendant’s cellar), [* 185] as in the said fourth count of the declaration mentioned, that before &c., to wit, on the 7th of January, 1834, the said plaintiff broke open the door of a cellar of the said defendant in a house of the said defendant, and then and there broke into the cellar of the said defendant, and got drunk, and spoiled the said work in the introductory part of the said declaration mentioned ; therefore, the said defendant did commit the supposed grievances in the introductory part of that plea mentioned, as he lawfully might for the the cause, aforesaid. And this, &c.

Replication. — *De injuriâ* to the second and last plea.

At the trial, before BOSANQUET, J., at the last Spring Assizes for the county of Devon, it appeared that the plaintiff was a journeyman carpenter and had been in the employ of Brinsdon, a master carpenter in the constant employ of the Earl of Devon, at Powderham Castle. That the defendant resided on a farm under the Earl of Devon. That the defendant required some repairs at his farm ; and that pursuant to the orders of Mr. Brinsdon, the plaintiff and another workman went to the defendant’s residence on the 7th of January, for the purpose of erecting a new door to the defendant’s tool-house (which adjoined the cellar), and doing other repairs to the house and premises of the defendant. It was proved that the work was done in a negligent manner, and not to Brinsdon’s satisfaction, the door being cut so small as not to answer the purpose for which it was intended. That, during the progress of the work, the plaintiff got drunk, and circumstances occurred which induced the defendant to believe that the plaintiff had broken open the

cellar door and obtained access to his cyder. Brinsdon had requested the defendant to inspect the work. It was proved that the plaintiff and one Taylor were at work on the 9th of January, at Powderham Castle, and that the defendant came up, and addressing himself to the plaintiff, spoke in his presence the following words, — “What a d——d * pretty piece of work you did at my house the other day.” That the plaintiff said, — “What, sir!” — and that the defendant replied, — “You broke open my cellar door, and got drunk, and spoiled the job you were about.” That the plaintiff denied the charges, but that the defendant said he would swear it, and so would his three men. It was also proved, that, in a subsequent conversation, when the plaintiff was not present, the defendant, in answer to a question put to him by Taylor, whether he really thought the plaintiff had broken the cellar door, said, — “I am sure he did it, and my people will swear to it.” That the defendant then went away in search of Mr. Brinsdon. It was proved that the defendant afterwards saw Brinsdon on the same day, the 9th of January, and that he said to him that Toogood had spoiled the door, and that the cellar had been broken open, and that Toogood had got drunk; he said, he considered it had been done with a chisel, and that Toogood did it, because of the getting drunk. It appeared that Brinsdon went afterwards to the plaintiff and told him, that he could be no longer in the employ of the Earl of Devon until this was cleared up; that he must come to the defendant’s with the other workman the following morning to have the matter investigated: that he, Brinsdon, went to the defendant’s the following morning, and that the plaintiff and defendant were there, and that he examined the cellar door, but doubted whether it had been broken open at all, though the bolt was broken; and Brinsdon told the plaintiff he considered the charge against him was not made out, and that he thought his character was cleared up, and that he might go to work again if he thought proper: but the plaintiff said his character was not cleared up: and he did not go to his work afterwards.

The learned Judge, in summing up the case to the jury, said, that he should have thought that the defendant would have been justified if he had made the complaint to Mr. Brinsdon in the first instance; but that he had spoken the * words in the presence of a third person, and that the speaking was not in the nature of a complaint to the plaintiff’s employ-

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That it appeared to him that the act of making the imputation to the plaintiff in the presence of another person gave the plaintiff a right to maintain the action. That the plaintiff also was not justified in making the subsequent charge to Taylor, in the absence of the plaintiff, that he had broken open the cellar door. The jury having found a verdict for the plaintiff, with 40s. damages, Follet, in Easter Term last, obtained a rule to show cause why a nonsuit should not be entered, or a new trial had, on the grounds — first, that the circumstances under which the words were spoken constituted it a privileged communication; and, secondly, on the ground of misdirection on the part of the learned Judge.

Praed showed cause. — There are two questions here, — First, it is said that the words in question were spoken under circumstances which made it a privileged communication; and, secondly, that the case was improperly summed up to the jury. With regard to the first point, it is submitted that this went beyond the nature of a privileged communication. Even if the defendant would have been justified in stating what he did to Brinsdon, he could not justify speaking the words to the plaintiff in the presence of a third person. The defendant does not even say that he comes to complain to Brinsdon. In *Macdougall v. Claridge*, 1 Camp. 267 (10. R. R. 679), Lord ELLENBOROUGH, in speaking of a communication as privileged, where it is made by one party interested to another having an interest in the same matter, complaining of the conduct of a person whom they had employed to manage their concerns, expressly puts it on the ground of the communication not being meant to go *beyond those immediately [* 188] interested in it. [ALDERSON, B. Here the damages were taken generally. Now, who can say what damages the jury gave for what was said to Brinsdon, and what damages they gave for what was spoken before Taylor?] If the defendant had a right to complain that the work was improperly done, he had no right to charge the plaintiff with breaking open the cellar door and getting drunk, as that amounts to a charge of felony. It may be said, that there is no allegation in the declaration, that the defendant meant to impute felony to the plaintiff; that, however, is immaterial, as there is an allegation and proof of special damage. In *Moore v. Meagher*, 1 Taunt. 39 (9 R. R. 702); it was held, that if, in consequence of words spoken, the plaintiff is deprived of substantial benefit arising from the hospitality of friends, that is a sufficient

temporal damage whereon to maintain an action. [PARKE, B. Here there was no special damage proved.] It is submitted that there was evidence to go to the jury, as it was proved that Brinsdon said he would not employ the plaintiff until his character was cleared: and though he told him afterwards that he might go to his work again, the plaintiff did not do so, because his character was not cleared. [PARKE, B. To make out special damage in this case, you should have shown that the plaintiff was removed from a beneficial employment, which you have not done. The jury did not find special damage, — they gave general damages.] Secondly, it is submitted, that the case was properly left to the jury, as the circumstances under which the words were spoken showed a malicious intention to injure the plaintiff. In *Dunman v. Bigg*, 1 Camp. 269, n. (10 R. R. 680 n.), Lord ELLENBOROUGH said. “It will be for the jury to say whether these expressions were used with a malicious intention of degrading the plaintiff, or with good faith to communicate facts to the surety which he was [*189] interested to know.” Now, here, * the words were not spoken to the party alone, but before another person; and, as it was not necessary that the defendant should speak the words in Taylor’s presence, or say what he did to Taylor, his doing so unnecessarily and officiously is a circumstance from which malice may be inferred. Here the defendant was betrayed into a passion, and has gone beyond what he was justified in saying. In *Rogers v. Clifton*, 3 Bos. & P. 587, it was held, that although a master is not in general bound to prove the truth of a character given by him to a person applying to him for the character of his servant, yet, if he officiously state any misconduct, even of a trivial nature, which he is not able to prove, the jury might, from these facts, infer malice. It depends much on the manner in which the words are spoken, whether they are to be deemed malicious or not. If I go to a tradesman, and, in a spiteful and revengeful manner before his other customers, say, that he has spoiled my coat, or sent me a bad joint of meat, that is conduct from which malice may be inferred. Besides, the plaintiff was not in the employ of the defendant, but in the employ of Brinsdon, and therefore the defendant had no right to complain of him. Here, the defendant has, at all events, gone beyond the limits of a confidential communication, in charging the plaintiff with breaking the cellar door and getting drunk. In *Godson v. Home*, 1 Brod. & Bing 7, 3 Moore, 223, RICHARDSON, J.,

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says: "If a man, giving advice, calls another a thief, surely it is not necessary to leave it to the jury whether such language is a privileged communication or not." Here, although the word thief is not used, the defendant says what is equivalent to it. It is quite clear the defendant meant more than to complain of the work being spoiled. If a man say to his tailor, in the presence of customers, "You sent me a bad coat," though he might be justified in speaking those words, he *cannot be justified [* 190] in saying, "You sent me a bad coat, and stole five of my books."

Follett, *contra*. In this case no special damage was proved, as the plaintiff was not dismissed by Brinsdon. When Brinsdon found that the door had not been broken open, he directed the plaintiff to go to his work again, but he did not do so; and therefore, if he suffered any damage, it was his own fault. The words spoken to Taylor were not spoken of the plaintiff in the way of his trade. [PARKE, B. Might not the words be spoken of him in his character of a journeyman carpenter. They might be spoken of him as having committed a felony in the course of his trade. It might be that he availed himself of his situation to commit the felony.] It is submitted, that such a general proposition cannot be laid down. Here, it was no part of the business of the carpenter to break open the cellar door. It is an act totally unconnected with his business as a carpenter, and those words are not spoken of him in the character of a carpenter. Words to be spoken of a man in his trade must relate to something done by him in the course of his particular calling. Besides, if the plaintiff had meant to say that the defendant had imputed felony to him, he should have alleged it in his declaration; there is, however, no such allegation or innuendo in this declaration. Suppose the words had been, "he had cheated his fellow-workmen," would they be actionable? It is submitted that they would not, inasmuch as they would have no relation to the plaintiff's trade. [ALDERSON, B. "You are an idle, dissolute workman; and when employed by me you robbed me:" are not these words actionable?] At all events, it was a question for the jury whether these words were spoken of the plaintiff in his trade, and that question was not left to them; therefore, the defendant is entitled to a new trial. Then, the learned Judge said that the defendant had no right to make the complaint in the presence of a third person; *but [* 191]

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surely a master has a right to complain of his servant in the presence of a third person, if it is done *bonâ fide*. If that were not so, in every case where the master complains of his servant in the presence of a third person, the servant would have a right of action against the master. Can it be said that a person who complains to a tradesman has no right to say in the presence of a third person that the work is badly done, when the complaint is made *bonâ fide*? [ALDERSON, B. You say that it is only evidence, more or less, of malice; but there is a communication to Taylor alone, which is not justified.] The complaint to Brinsdon was, at all events, justifiable. The Court cannot know what damages the jury gave for those words, and what for the others, as the damages are general. If the complaint is made under circumstances that induce the party to believe in the truth of it, and he makes the complaint to the other party *bonâ fide*, it is privileged. All the cases where it has been held that the communications were not justifiable, were made to a third party, and not to the party himself. [ALDERSON, B. There are many cases in which words spoken in the presence of a third party have been held actionable, where the transaction was gone by, so that the party complained of was not able to right himself.] Here, the complaint was made at the time. It is submitted, that the learned Judge ought to have nonsuited. [ALDERSON, B. Surely it was a question for the jury.] It is only where there is some evidence to show that the defendant is not acting *bonâ fide* that it becomes a question for the jury. But, where a party *bonâ fide* complains that work is badly done, it is a question of law, whether it is a privileged communication or not. *Cur. adv. vult.*

On a subsequent day, the judgment of the Court was delivered by —

[* 192] * PARKE, B. In this case, which was argued before my Brothers BOLLAND, ALDERSON, GURNEY, and myself, a motion was made for a nonsuit, or a new trial, on the ground of misdirection. It was an action of slander, for words alleged to be spoken of the plaintiff as a journeyman carpenter, on three different occasions. It appeared that the defendant, who was a tenant of the Earl of Devon, required some work to be done on the premises occupied by him under the Earl, and the plaintiff, who was generally employed by Brinsdon, the Earl's agent, as a journeyman, was sent by him to do the work. He did it, but in a negligent

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manner; and, during the progress of the work, got drunk; and some circumstances occurred which induced the plaintiff to believe that he had broken open the cellar door, and so obtained access to his cyder. The defendant a day or two afterwards met the plaintiff in the presence of a person named Taylor, and charged him with having broken open his cellar door with a chisel, and also with having got drunk. The plaintiff denied the charges. The defendant then said he would have it cleared up, and went to look for Brinsdon; he afterwards returned and spoke to Taylor, in the absence of the plaintiff; and, in answer to a question of Taylor's, said he was confident that the plaintiff had broken open the door. On the same day the defendant saw Brinsdon, and complained to him that the plaintiff had been negligent in his work, had got drunk, and he thought he had broken open the door, and requested him to go with him in order to examine it. Upon the trial it was objected, that these were what are usually termed "privileged communications." The learned Judge thought that the statement to Brinsdon might be so, but not the charge made in the presence of Taylor; and in respect of that charge, and of what was afterwards said to Taylor, both which statements formed the subject of the action, the plaintiff had a verdict. We agree in his opinion, that the communication to Brinsdon was *protected, and that the statement, upon the second [*193] meeting, to Taylor, in the plaintiff's absence, was not; but we think, upon consideration, that the statement made *to* the plaintiff, though in the presence of Taylor, falls within the class of communications ordinarily called privileged; that is, cases where the occasion of the publication affords a defence in the absence of express malice. In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common conven-

ience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

Among the many cases which have been reported on this subject, one precisely in point has not, I believe, occurred; but one of the most ordinary and common instances in which the principle has been applied in practice is, that of a former master giving the character of a discharged servant; and I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry, *alone*, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry and that has been very liberally construed, *Child v. Affleck*, 4

Man. & Ry. 590, 9 B. & C. 403), the simple fact that there [*194] has been *some casual bystander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed upon this and similar communications, and if, on every occasion in which they were made, they were not protected unless strictly private. In this class of communications is, no doubt, comprehended the right of a master *bonâ fide* to charge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another, does by no means of necessity take away from it the protection which the law would otherwise afford. Where, indeed, an opportunity is sought for making such a charge before third persons, which might have been made in private, it would afford strong evidence of a malicious intention, and thus deprive it of that immunity which the law allows to such a statement, when made with honesty of purpose; but the mere fact of a third person being present does not render the communication absolutely unauthorized, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted *bonâ fide* in making the charge, or been influenced by malicious motives. In the present case, the defendant stood in such a relation with respect to the plaintiff, though not strictly that of master, as to authorize him to impute blame to him, provided it was done fairly and honestly, for any supposed misconduct in the course of his employment; and we think that the fact that the imputation was made in Taylor's

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presence, does not, of itself, render the communication unwarranted and officious, but at most is a circumstance to be left to the consideration of the jury. We agree with the learned Judge, that the statement to Taylor, in the plaintiff's absence, was unauthorized and officious, and therefore not protected, although made in the belief * of its truth, if it were, in point of fact, false; [* 195] but, inasmuch as no damages have been separately given upon this part of the charge alone, to which the fourth count is adapted, we cannot support a general verdict, if the learned Judge was wrong in his opinion as to the statement to the plaintiff in Taylor's presence; and, as we think that at all events it should have been left to the jury whether the defendant acted maliciously or not on that occasion, there must be a new trial.

Rule absolute for a new trial.

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27 L. J. Q. B. 252-255 (s. c. El. Bl. & El. 346; 4 Jur. N. S. 834).

Libel. — Slander. — Privileged Communication. — Malice. [252]

Under section 61 of the Common Law Procedure Act, 1852, it is not necessary in a declaration for libel or slander that there should be any *colloquium*; but the plaintiff may set out the words, and put any construction he pleases upon them.

Where the libel upon which the action is brought is a privileged communication, it is allowable to give in evidence statements made by the defendant on an occasion subsequent to the publication of the libel, which statements tend to show malice in the defendant towards the plaintiff: but the Judge ought to call the attention of the jury to the distance of time which had elapsed before the subsequent statements, and to caution them that those statements might have referred to some other matter, and that they might therefore not be any proof of malice at the time of publication of the libel.

Action for libel and slander.

The first count of the declaration stated, that the defendant falsely and maliciously spoke and published of the plaintiff the words following: that is to say, "What do you think of my job? I am satisfied who it was got into my shop, as George Hearman tells me that he met Hemmings (meaning the plaintiff) and his son about four * o'clock the morning my shop was [* 253] broken into. I found part of a letter on the floor of my shop, which was in the handwriting of Hemmings," — meaning by the false and malicious words aforesaid, that the plaintiff had for-

cibly and with a strong hand broken and entered the defendant's shop, and had wilfully and maliciously, and within three calendar months then last past, cut, damaged, and destroyed the defendant's property in the said shop, to wit, household furniture of the defendant, contrary to the statute in such case provided, and had committed criminal offences punishable by law.

The second count stated, that the defendant heretofore, to wit, on, &c., falsely and maliciously wrote and published of the plaintiff the false and malicious libel, of and concerning the plaintiff, following, that is to say:—

“RYE, April 9th, 1857.

“To the Editor of the Rye Chronicle.

“SIR, — In your last number I am accused by George Hemmings of having circulated a report charging him with damaging my property. I will ask any one who I could judge more than him? he having said he would be revenged on me, because I prevented him and his father from taking £80 belonging to the late Mr. Ashton. I have several other matters, all tending to substantiate my opinion in this matter. I will state but one: I have the handwriting, which I believe to be his father's, James Hemmings (meaning the plaintiff), which was found on the premises on the morning the diabolical act was committed; and I am not alone in this belief, for, with one or two exceptions, all who have seen the writing are of the same opinion. I could offer a more lengthened statement of this vile transaction, but I have been advised not to do so, as it may defeat the ends of justice.

(Signed)

“JAMES HENRY GASSON.”

Meaning by the said libel that the plaintiff had, together with the said George Hemmings, wilfully and maliciously cut and damaged and destroyed certain household furniture of the defendant, and by means of the premises the plaintiff's character and reputation has been much injured.

Plea, not guilty, and issue thereon.

At the trial, which took place before ERLE, J., at the Sittings in last Hilary term, at Westminster, evidence was given in support of both counts of the declaration. It appeared that the letter which contained the libel charged in the second count was written in answer to one written by the son of the plaintiff to the Rye

No. 6. — *Hemmings v. Gasson*, 27 L. J. Q. B. 253, 254.

Chronicle, on the 2nd of April, 1857; and in support of that count, in order to prove malice, a witness (J. Burgess) was called, who swore that, on the Saturday before the trial, he had heard the defendant speak of the plaintiff at a public house called The Albion, at Rye; that the defendant said that the plaintiff was a dishonourable man; that he had drawn and dishonoured bills, and and that he (the defendant) knew him to be a rascal. This evidence was objected to, but was admitted, as the learned Judge held that the libel was a privileged communication, and that therefore the evidence was admissible to prove malice in the defendant.

The jury returned a verdict for the plaintiff: damages on first count, £40; damages on second count, £60.

Subsequently, a rule *nisi* was obtained by —

Ballantine, Serj., calling on the plaintiff to show cause why the verdict should not be set aside, and why the judgment should not be arrested, on the ground that the innuendoes in both counts were not supported by the words and writing, and why a new trial should not be had, on the ground that the evidence of J. Burgess was improperly admitted, and that the jury was misled by the way that evidence was left to them.

Cause was shown against this rule by —

Parry, Serj., and A. Wills (May 26).¹ — Both counts are good. The objection is, that there is no *colloquium*, but it is not necessary that there should be any. The jury must be taken to have found that the words spoken and written meant that which the plaintiff alleges they did, for they have assessed the damages on both counts. The question is settled by section 61 of the Common Law Procedure Act, 1852, which enacts, that “in actions of libel and slander, the plaintiff shall be at * lib- [* 254] erty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient.” And a form of declaration is given in schedule B. (No. 33), in accordance with which this declaration is drawn. Next, an objection is made on the second count, that the evidence of Burgess ought not

¹ Before Lord CAMPBELL, C. J., COLERIDGE, J., ERLE, J., and CROMPTON, J.

to have been received. But this was a case of privileged communication, and the evidence was properly received, as it showed that the defendant was actuated by malice against the plaintiff.

[ERLE, J. I thought if the letter was an honest communication in answer to the letter written by the plaintiff's son to the newspaper, and if no malice was shown, the verdict should be given for the defendant; but if the letter was written with a malicious motive, the verdict should be for the plaintiff.]

The distinction is clear between privileged communications, and slanders or libels, which are not so. In the former case, it is necessary to prove malice, and it is important to show what was the state of the mind of the defendant at the time he published the slander or libel. Evidence like this was received in *Simpson v. Robinson*, 12 Q. B. 511, 18 L. J. Q. B. 73. In *Wright v. Woodgate*, 2 Cr. M. & R. 573, which was an action for a libel contained in a letter written by the defendant, Lord WENSLEYDALE, then Mr. Baron PARKE, after stating that it was incumbent upon the plaintiff to show malice in fact, said, "This he might have made out, either from the language of the letter itself, or by extrinsic evidence, as by proof of the conduct or expressions of the defendant, showing that he was actuated by personal ill-will."

[COLERIDGE, J. The question is not whether extrinsic evidence is admissible, but whether this particular evidence ought to have been received.]

The statements made by the defendant are just as admissible as if there had been evidence that he had said that he hated the plaintiff. In *Finnerty v. Tipper*, 2 Camp. 72, it was held, that other libels could not be given in evidence unless they directly referred to the libel set out in the declaration, but in that case there was no privileged communication, and therefore there was no necessity for the evidence.

[CROMPTON, J. referred to *Pearson v. Lemaître*, 5 M. & G. 700, 12 L. J. (N. S.) C. P. 253.]

Rustell v. Macquister, in the notes to *Thompson v. Bernard*, 1 Camp. 49, is a decision contrary to *Finnerty v. Tipper*.

[Lord CAMPBELL, C. J. Those two cases are reconcileable if we suppose that in *Finnerty v. Tipper* the words proved did not refer to the libel.]

The matter is gone into in 2 Starkie on Libel, p. 55, where *Mead v. Deabigay*, Peake's N. P. 125, is referred to. In that case, Lord

Kenyon rejected evidence of words actionable of themselves, and not mentioned in the declaration, but his Lordship afterwards changed his opinion, and admitted such evidence in a subsequent case. The evidence goes to show the state of the mind of the defendant, and is therefore admissible.

Ballantine, Serj., and Honeyman, in support of the rule. — First, the words declared upon are not susceptible of the meaning put upon them. *Blagg v. Sturt*, 10 Q. B. 899, 16 L. J. Q. B. 39, No. 11 p. 117, *post*.

[Lord CAMPBELL, C. J. Is not that a question for the jury?]

Secondly, the statements of the defendant ought not to have been received. They have no bearing upon the actual state of the defendant's mind at the time he wrote the libel, nor is there anything to show that the feelings which he had at the time of making the statements had any connection with his feelings at the time he published the libel. *Finnerty v. Tipper* shows that the words to be proved must have some reference to the libel, but here *there was none, and *Finnerty v. Tipper* has not [*255] been overruled.

[Lord CAMPBELL, C. J. The plaintiffs rely upon the fact that there was there no privileged communication.]

But that case has always been relied on. *Parson v. Lemaitre*, *Macleod v. Wakley*, 3 Car. & P. 311, *Cumfield v. Bird*, 3 Car. & K. 56, and *Perkins v. Vaughan*, 4 M. & G. 988. If this evidence is received, where is the line to be drawn? are statements made many years afterwards to be admissible?

[Lord CAMPBELL, C. J. The statements are evidence from which the jury may or may not infer malice.]

[CROMPTON, J. referred to *Barrett v. Long*, 3 H. L. Cas. 395.]

It lies upon the other side to satisfy the Court that the evidence was admissible, and that it related to the subject-matter of the libel, and there is no case in which it has been held that words not so related are admissible. All the cases are collected in 1 Taylor on Evidence, 2nd edit. pp. 303, 304, 305.

Lord CAMPBELL, C. J. Upon the second point the Court will take time to consider, but upon the first point we are all agreed that section 61 of the Common Law Procedure Act, 1852, and the 32nd and 33rd Forms in Schedule B. show that it was intended to do away with all such objections, and to enable the pleader to put any such construction upon the words as he may choose, and to

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leave it to the jury to say whether such a construction was borne out by the evidence.

Rule discharged as to the arrest of judgment.

Cur. adv. vult.

The judgment of the Court was now delivered by —

LORD CAMPBELL, C. J. We are of opinion that there must be a new trial; we do not say that the evidence of Burgess was inadmissible, for it was a question of privileged communication, and it was necessary to show that there was express malice, but we think that the Judge ought more fully to have pointed the attention of the jury to the fact of the distance of time between the speaking of the words and the publication of the libel, and to have told them that the words might have applied to something else. The words "Hemmings is a dishonourable man" were spoken a considerable time after the alleged libel was published. If the jury had had their attention more fully called to this, they might have come to this conclusion, that these words referred to something subsequent to the libel, and therefore that they did not amount to any proof of malice at the time of the publication of the libel. We think, therefore, that there ought to be a new trial; costs to abide the event of the new trial.

Venire de novo.

ENGLISH NOTES.

The following are the chief kinds of communications which enjoy a qualified privilege. That is to say, the privilege is destroyed by proof of express (*i. e.* actual) malice.

1. Publication of extracts from a register kept in compliance with an Act of Parliament. *Fleming v. Newton* (1848), 1 H. L. Cas. 343, So. per POLLOCK, B., in *Williams v. Smith* (1888), 22 Q. B. D. 134, at p. 139, 58 L. J. Q. B. 21, 59 L. T. 757, 37 W. R. 93. In *Scarlett v. Scarlett* (C. A. 1892), 1892, 2 Q. B. 56, 61 L. J. Q. B. 573, 66 L. T. 837, 40 W. R. 696, Lord ESNER, M. R., said (1892, 2 Q. B. at p. 60), "Where there is a register kept by virtue of an Act of Parliament for the purpose of giving information to the public, then, if a person makes a copy of it and publishes it, though he does so for the purpose of warning the public or tradesmen about to give credit, yet if all that he does is to publish a copy of the register which is intended to be a public document, it is a privileged communication." The case of *Williams v. Smith* (*supra*) itself indicates the limitation of this immunity. The defendant published in the Hatters' Gazette the extract of a County

Court judgment which had been recovered against the plaintiff. This was contained in a list of "County Court judgments" along with which was published a list of "Bills of Sale," and both placed under the general heading of "The Gazette." The plaintiff had in fact settled the amount of this judgment outside the Court, but no satisfaction was entered on the County Court Register. The jury found that the libel, *i. e.*, the statement published in the paper, meant that there was an unsatisfied judgment against the plaintiff on the day of the publication. The Court held that the words were capable of the innuendo charged, and that the verdict was not against evidence. It was no defence that the record of the Court was correctly transcribed.

Instances of publications of extracts from public registers are publications by trade or mercantile journals of receiving orders under the Bankruptcy Act, of the Registration of Bills of Sale, of County Court judgments, &c., &c.

2. By section 3 of the Libel Law Amendment Act 1888. "a fair and accurate report in any newspaper of proceedings publicly heard before any Court exercising judicial authority, shall, if published contemporaneously with such proceedings, be privileged; provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter."

The section appears to embody the law which has been in effect laid down by the modern authorities at common law. *Smith v. Scott* (1847), 2 C. & K. 580; *Lewis v. Lery* (1858), El. Bl. & El. 557, 27 L. J. Q. B. 282; *Ryalls v. Leader* (1865), L. R., 1 Ex. 296, 35 L. J. Ex. 185, 14 L. T. 563, 14 W. R. 838. The protection existed although one of the parties to the proceedings honestly and without malice published the judgment only, and omitted the rest of the proceedings at the trial. *Macdougall v. Knight* (1889), 14 App. Cas. 194, 58 L. J. Q. B. 537, 60 L. T. 762, 38 W. R. 44. It is suggested by some of the judgments that no privilege would attach if the judgment itself, though truly reported, did not give a complete and substantially accurate account of the matter adjudicated upon. But this point although pleaded was not put in the questions submitted to the jury, which were all answered in favour of the defendants; and the plaintiff, not having raised the point by motion for judgment notwithstanding the verdict, was held not entitled to raise it in the Court of ultimate appeal. That no privilege attaches if the effect of the judgment was not truly reported was held by NORTH, J., in *Hayward v. Hayward* (1887), 34 Ch. D. 198, 56 L. J. Ch. 287, 55 L. T. 729, 35 W. R. 392. The Court made no distinction between publication of the report in a newspaper or by a private individual. *Milissich v. Lloyds* (C. A. 1877), 13 Cox. C. C. 575, 46 L. J. C. P. 404, 36 L. T. 423, 25 W. R. 353. *Ex parte pro-*

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ceedings were held to enjoy the same privilege in *Usill v. Hales* (1878), 3 C. P. D. 319, 47 L. J. C. P. 323, 38 L. T. 65, 26 W. R. 371. This case was followed in *Kimber v. Press Association* (C. A. 1893), 1893, 1 Q. B. 65, 62 L. J. Q. B. 152, 67 L. T. 515, 41 W. R. 17.

It was decided by the Court of Appeal in *Stevens v. Sampson* (C. A. 1879), 5 Ex. D. 53, 49 L. J. Ex. 120, 41 L. T. 782, 28 W. R. 87, that the privilege is destroyed by proof of actual malice. It is not clear from the language of the above section whether the privilege is intended to be absolute. The absence of the proviso contained in the 4th section (referred to below) may suggest an argument to the contrary. Yet if the legislature intended to extend to a new class of cases the extraordinary benefit of an absolute privilege, it might have been expected that the flexible word "privilege" should have been expressly defined.

3. Reports of Parliamentary proceedings. *Wason v. Walter* (1868), L. R., 4 Q. B. 73, 38 L. J. Q. B. 34, 19 L. T. 409, 17 W. R. 169, 8 B. & S. 671.

In *Davis v. Shepstone* (1886), 11 App. Ca. 187, 55 L. J. P. C. 51, 55 L. T. 1, 34 W. R. 722, it was decided that the privilege attached to reports of parliamentary and judicial proceedings does not extend to reports of the conduct of public persons in the discharge of their public functions obtained by reporters and published in newspapers, however trustworthy such reports may apparently have been.

4. By section 4 of the Libel Law Amendment Act 1888, a fair and accurate report published in any newspaper of the proceedings of a public meeting or of various meetings of a public character there specified, is declared to be privileged, provided the publication is not malicious, and there has been no refusal to insert in the newspaper a reasonable statement by way of contradiction or explanation at the request of the person whose conduct has been impugned at the meeting.

5. By the same section, notices and reports published at the request of any government office or department, officer of state, Commissioner of Police, Chief Constable, are declared to be privileged in absence of malice.

6. A communication affecting a government official, and addressed to a proper person is privileged. For instance a petition addressed to the House of Commons concerning the vicar-general, *Lake v. King* (1669), 1 Levinz, 240, a letter addressed to the Secretary of War to compel a military officer to pay his debts, *Fairman v. Ives* (1822), 5 B. & Ald. 642, 24 R. R. 514; a letter addressed to the Postmaster-General complaining of the conduct of a postmaster, *Blake v. Pilfold* (1832), 1 Moo. & Rob. 198; *Woodward v. Lander* (1834), 6 C. & P. 518; a letter written to a bishop concerning the conduct of a parson in his diocese, *James v. Boston* (1815), 2 C. & K. 4; a memorial addressed to the Lord Chancel-

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lor complaining of the conduct of a magistrate, *Harrison v. Bush* (1855), 5 El. & Bl. 344, 25 L. J. Q. B. 25; a petition addressed to the Privy Council concerning a sanitary Inspector, *Proctor v. Webster* (1885), 16 Q. B. D. 112, 55 L. J. Q. B. 150, 53 L. T. 765 (where however the privilege was rebutted by evidence of express malice). In *Hart v. Gumpach* (1872), L. R. 4 P. C. 439, 42 L. J. P. C. 25, 21 W. R. 365, A., a British subject, acting on behalf of the Chinese government, employed G. as a professor in a Chinese college. A. afterwards made a report to the Chinese government concerning the conduct of G. as such professor, in consequence of which G. was dismissed. It was held, that, there being no proof of malice, A.'s communication was privileged.

Communications sent to prevent or punish a crime or an offence are similarly situated. *Johnson v. Evans* (1800), 3 Esp. 32, 6 R. R. 809. So a statement by a servant to his master that his goods have been stolen by a particular individual; or a letter sent to a schoolmaster or to a father explaining the delinquencies of a youth under his charge. *Fowler v. Homer* (1812), 3 Camp. 294, 13 R. R. 807; *Kine v. Sewell* (1838), 3 M. & W. 297.

7. A statement made to protect the interest of the person making it, (*Somervell v. Hawkins* (1851), 10 C. B. 583, 20 L. J. C. P. 131, 15 Jur. 450; *Manby v. Witt* (1856), 18 C. B. 544, 25 L. J. C. P. 294, 2 Jur. N. S. 1004; *Blackam v. Pugh* (1846), 2 C. B. 611, 15 L. J. C. P. 290), and reasonably necessary for such object, enjoys a qualified privilege. "If a man *bonâ fide* writes a letter in his own defence and for the defence and protection of his rights and interests, and is not actuated by any malice, that letter is privileged, although it may impute dishonesty to another; but in such a case, malice may either be proved by the letter itself or by other evidence." *Per* LITTLEDALE, J., in *Coward v. Whelington* (1836), 7 C. & P. at p. 586.

A policy holder charged the directors of an Insurance Company with fraud. The directors published a pamphlet in defence and charged the plaintiff with making false and calumnious accusations, and with contradicting a previous statement made by him on oath. The jury found that the counter charges were not beyond the occasion. It was held that the pamphlet was privileged. *Koenig v. Ritchie* (1862), 3 F. & F. 413; *Reg v. Veley* (1867), 4 F. & F. 1117.

The plaintiff was employed as a master of a ship insured with the defendants, who refused to continue the insurance, if the plaintiff remained captain of the ship. The plaintiff was dismissed from the service. In an action of libel against the defendants, the plea was that the defendants acted *bonâ fide* and without malice on information received by them from sources worthy of credit. The plea was held

to be good. *Hamou v. Fall* (1879), 4 App. Cas. 247, 48 L. J. P. C. 45.

If the defendant starts an unprivileged statement against the plaintiff, and in explaining the statement utters a libel, the explanation is not privileged. *Smith v. Mathews* (1831), 1 Moo. & Rob. 151. So, unnecessarily wide publication of a privileged statement destroys the privilege. *Robertson v. M'Dowall* (1828), 4 Bing. 620, 3 C. & P. 259; *Jones v. Williams* (1885), 1 Times Law Rep. 572.

If an occasion is privileged, the mere fact that the statement complained of was in excess of the occasion does not rebut the defence of privilege, unless the jury find actual malice. *Nerill v. Fine Arts Insurance Company* (C. A. 1895), 1895, 2 Q. B. 156, 64 L. J. Q. B. 681, 72 L. T. 525. See Notes to No. 11 p. 127, *post*.

8. "If a communication was of such a nature that it could be fairly said that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them, when these two things coexist, the occasion is a privileged one." *Per* Lord ESHER, M. R., in *Hunt v. Great Northern Railway Company* (1891), 1891, 2 Q. B. at p. 191, 60 L. J. Q. B. 498. This of course means "privileged" in the qualified sense that actual malice would take the case out of the privilege. For instance, a letter by a ratepayer affecting the character of a constable to be read at a parish meeting at which the accounts of the parish were to be considered, *Spencer v. Amerton* (1835), 1 Moo. & Rob. 470; a communication made by a relative to a lady as to the character of her intended husband, *Todd v. Hawkins* (1837), 8 C. & P. 88; an accusation made by a parishioner before justices sitting in special sessions, and objecting to the plaintiff who was about to be sworn in as a parish constable, *Kershaw v. Bailey* (1848), 1 Ex. 743, 17 L. J. Ex. 129. The defendant, a tradesman, having reason to suspect that the plaintiff, a servant of M. one of his customers, had when sent to the defendant's premises by M. abstracted property belonging to the defendant, communicated to M. the reasons of his suspicions. It was held that the communication was privileged. *Aman v. Daman* (1860), 8 C. B. (n. s.) 597, 29 L. J. C. P. 313.

A charge made at a parish meeting convened for the nomination of officers, as to the previous conduct in office of a parish officer seeking re-election was held to be privileged. *George v. Goddard* (1861), 2 F. & F. 689.

R., a tradesman, received letters purporting to come from the defendant, and ordering targets to be sent to the headquarters of a regiment of volunteers of which the defendant was honorary secretary. In answer to questions from R. the defendant denied ordering the goods,

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and added, “On comparison of the order and others, with letters in the office in the handwriting of Dr. C. (the plaintiff), I have no hesitation in saying as my firm opinion that all the letters are in his handwriting.” The jury found that the defendant wrote the letters without malice in the *bonâ fide* belief of the truth of his statement. Held that the letter was privileged. *Croft v. Stevens* (1862), 7 H. & N. 570, 31 L. J. Ex. 143.

A correspondence between a curate of one parish church, and the defendant, an incumbent of another parish church, as to the character of a parishioner of the latter who had formerly lived in the parish in which the curate worked, relating to a proposal that the defendant should arbitrate in a dispute between two members of the church, and in which the defendant gave his reasons for declining to do so, was held to be privileged. *Whiteley v. Adams* (1864), 15 C. B. (N. S.) 292, 33 L. J. C. P. 89. So a letter by one creditor, appointed as the trustee in bankruptcy of the debtor's estate, to another creditor respecting the debtor. *Spill v. Maule* (1869), L. R., 4 Ex. 232, 38 L. J. Ex. 138, 20 L. T. 675, 17 W. R. 805. Similarly a bishop's charge to his clergy, *Laughton v. Bishop of Sodor and Man* (1872), L. R., 4 P. C. 495, 42 L. J. P. C. 11, 28 L. T. 377, 21 W. R. 204, and a communication between a vicar and curate for the purpose of obtaining advice as to the course to be pursued on an ecclesiastical matter, were decided to be privileged. *Clarke v. Molyneux* (C. A. 1877), 3 Q. B. D. 237, 47 L. J. Q. B. 230, 37 L. T. 694, 26 W. R. 104. The judgment of BRAMWELL, L. J., contains a clear statement of the way in which the question ought to be left to the jury in such cases. He says: “The proper direction to the jury would have been this: ‘These occasions are privileged, and unless you are satisfied that the defendant availed himself of them, or on the occasion spoke *malâ fide*, maliciously (with an explanation of what is meant by that word), then you ought to find for the defendant.’” In *Quartz Hill Gold Mining Company v. Beal* (C. A. 1882), 20 Ch. D. 509, 51 L. J. Ch. 874, 46 L. T. 746, 30 W. R. 583, a circular written by a solicitor for some of the shareholders of the company and sent to other shareholders upon a matter of interest to the company was held to be *primâ facie* privileged. In this case it was laid down that where a communication is *primâ facie* privileged (*sub modo*), and the ground of action is that the privilege has been abused, the Court will exercise the utmost caution before acceding to an application to restrain the publication, especially by interlocutory injunction. The MASTER OF THE ROLLS (Sir J. JESSEL) said: “A judge should hesitate long before he decides so difficult a question as that of privilege upon an interlocutory application, the circular being, on the face of it, privileged, and the only answer being express malice.”

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The privilege is destroyed if the communication is made known to an unnecessarily large number of persons. *Toogood v. Spyring*, the first principal case; *Duncombe v. Daniell* (1836), 8 C. & P. 222; *Martin v. Strong* (1836), 5 Ad. & El. 538; *Hoare v. Silverlock* (1848), 12 Q. B. 624, 17 L. J. Q. B. 306, 12 Jur. 695; *Parsons v. Surgey* (1864), 4 F. & F. 247; or if made maliciously. *Jackson v. Hopperton* (1854), 16 C. B. (N. S.) 829, 10 L. T. 529, 12 W. R. 913. If statements are made beyond the necessity of protecting the common interest, the occasion is not, so far as relates to those statements, a privileged one. *Fryer v. Kinnersly* (1863), 15 C. B. (N. S.), 422, 33 L. J. C. P. 96, 9 L. T. 415, 12 W. R. 155.

9. Statements made in discharge of a duty, which may be either legal, moral, or social (*per* LOPES, L. J., in *Stuart v. Bell* (1891), 1891, 2 Q. B. at p. 353, 60 L. J. Q. B. 577, 64 L. T. 633, 39 W. R. 612) are privileged. For instance, an answer to an enquiry as to the character of a clerk or servant, *Rogers v. Clifton* (1803), 3 Bos. & P. 587; *Murdoch v. Funduklian* (1885), 2 Times Law Rep. 215, 614; a letter written by a solicitor to his client, *Wright v. Woodgate* (1835), 2 Cr. M. & R. 573; a letter written by the director of a company to its members concerning the conduct of an officer of the company, *Harris v. Thompson* (1853), 13 C. B. 333; the report of an officer in the Army or Navy to his superior officer, *Sutton v. Plumridge* (1867), 16 L. T. 741; *Stace v. Griffiths* (1869), L. R., 2 P. C. 420, 20 L. T. 197; *Henwood v. Harrison* (1872), L. R., 7 C. P. 606, 41 L. J. C. P. 206, 26 L. T. 938, 20 W. R. 1000; the statement of a person connected with a charity as to the character of a person seeking continuation in office as the trustee of the charity, *Corles v. Potts* (1865), 34 L. J. Q. B. 247, 13 W. R. 858, 11 Jur. N. S. 946; the report of the auditor of a company to its directors and communicated by them to the shareholders, *Lawless v. Anglo Egyptian Cotton & Oil Company* (1869), L. R., 4 Q. B. 262, 38 L. J. Q. B. 129, 17 W. R. 498, 10 B. & S. 226; a letter written by an undermaster of a school to the headmaster, *Hume v. Marshall* (1878), 42 J. P. 136; an answer to a confidential enquiry, *Robertson v. Smith* (1878), 38 L. T. at p. 423; a letter written by a society for suppression of mendicancy to a person enquiring about the plaintiff who had applied to him for help, *Waller v. Lock* (C. A. 1881), 7 Q. B. D. 619, 51 L. J. Q. B. 274, 45 L. T. 242, 30 W. R. 18; statements made to a master as to the doings of his servant, *Masters v. Rogers* (1886), 3 Times Law Rep. 96.

In the case of *Henwood v. Harrison* above mentioned, the question arose out of the publication by the authority of the Board of Admiralty of a board minute relating to the loss of *The Captain* containing a letter of the Controller of the Navy to the Board, reflecting upon cer-

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tain plans of ship construction which had been submitted by the plaintiff. It was common ground of the judgments of the Court that the letter was privileged. The question upon which the Court differed was whether the privilege extended to the sale of copies to the public. It was held by the majority, WILLES, J., BYLES, J., BRETT, J., against GROVE, J., that the publication was privileged on account of the public interest in the important matters brought under discussion.

In *Allbutt v. General Council of Medical Education* (C. A. 1889), 23 Q. B. D. 400, 58 L. J. Q. B. 606, 61 L. T. 585, 37 W. R. 771, a publication of the minutes of the General Council of Medical Education containing a statement that the name of a practitioner had been removed on the ground of professional misconduct was held to be privileged. In *Hunt v. Great Northern Railway Company* (C. A. 1891), 1891, 2 Q. B. 189, 60 L. J. Q. B. 498, the defendant company discharged one of their servants, and in a circular informed the other servants why the dismissal took place. The circular was held to be privileged. In *Pittard v. Oliver* (C. A. 1891), 1891, 1 Q. B. 474, 60 L. J. Q. B. 219, 64 L. T. 758, 39 W. R. 311, it was decided that the privilege attaching to defamatory statements made at a meeting of a board of guardians was not destroyed by the presence of reporters.

In *White v. Batey* (1892), 8 Times Law Rep. 690, a letter written by the member of a trade protection society to its secretary was held to be privileged. In *Borsius v. Goblet* (C. A. 1893), 1894, 1 Q. B. 842, 63 L. J. Q. B. 401, 70 L. T. 368, 42 W. R. 392, a solicitor in discharge of his duty towards a client dictated to his clerk a letter containing defamatory statements concerning the plaintiff. The communication to the clerk was considered to be privileged.

Even a volunteered statement made *bonâ fide* and in order to enable the person to whom it is made to clear himself from imputations on his conduct, is privileged. *Davies v. Sneed* (1870), L. R., 5 Q. B. 608, 39 L. J. Q. B. 202, 23 L. T. 126.

A communication made by a parliamentary agent and chairman of the committee of one of two rival candidates to the agent of the rival candidate, charging the plaintiff with bribery in favour of the latter candidate, is not privileged. *Dickson v. Hilliard* (1874), L. R., 9 Ex. 79, 43 L. J. Ex. 37, 30 L. T. 196, 22 W. R. 372.

The watch committee of the justices of a borough to facilitate business at the general licensing meeting, ordered the head constable to issue to persons having business at the meeting copies of his report which stated the ground of his objection to the renewal of licenses. This publication of the report was held to be privileged by reason that the constable, in issuing the copies under the order of the watch committee, was performing a statutory duty under the 7th section of the

(Police) Act 19 & 20 Vict. c. 69. *Andrews v. Nottblower* (C. A. 1895), 1895, 1 Q. B. 888, 64 L. J. Q. B. 536, 72 L. T. 530, 43 W. R. 582.

Two other defences to an action of libel or slander are: —

1. Fair and *bonâ fide* comment on a matter of public interest.

Campbell v. Spottiswoode (1863), 3 B. & S. 769, 32 L. J. Q. B. 185, 8 L. T. 201, 11 W. R. 569, S. C., at *Nisi Prius*, 3 F. & F. 421; *Kelly v. Tinling* (1866), L. R., 1 Q. B. 699, 35 L. J. Q. B. 940, 13 L. T. 255, 14 W. R. 51; *Wason v. Walter* (1868), L. R., 4 Q. B. 73, 38 L. J. Q. B. 34, 19 L. T. 409, 17 W. R. 169, 8 B. & S. 671; *Merivale v. Carson* (C. A. 1887), 20 Q. B. D. 275, 58 L. T. 331, 36 W. R. 231. The comment must be fair. It must not be a cloak for malice. Imputation of bad, wicked, or improper motives, without justification, makes the comment actionable. *Couper v. Lawson* (1838), 8 Ad. & El. 746, 1 P. & D. 15, 1 W. W. & H. 601, 2 Jur. 919; *Campbell v. Spottiswoode* (*supra*), *Harle v. Catterall* (1866), 14 L. T. 801; *Bryce v. Rusden* (1886), 2 Times Law Rep. 435; *Brenon v. Ridgway* (1887), 3 Times Law Rep. 592.

2. By 6 & 7 Vict. c. 96, s. 2, when a libel is published in a newspaper without malice and without gross negligence, insertion of an apology at the earliest possible opportunity is made a good defence; and the defendant may pay money into Court by way of amends. By 8 & 9 Vict. c. 75, s. 2, payment of some money by way of amends is made essential to a valid plea under the former Act.

AMERICAN NOTES.

The American doctrine accords with the first branch of the rule. Mr. Newell says (Defamation, p. 391): "A communication made in good faith upon any subject-matter in which the party communicating has an interest or in reference to which he has a duty, moral or social, if made to a person having a corresponding interest or duty, is privileged, and the burden of proving the existence of malice is cast upon the person claiming to have been defamed." Citing the principal cases; *Laughton v. Bishop*, 8 C. P. 495; *Harrison v. Bush*, 5 E. & B. 314.

The following instances have been adjudged to furnish the privilege in question: Words spoken in defence of a clergyman before a presbytery, *M'Millan v. Birch*, 1 Binney (Penn.), 178; 2 Am. Dec. 426. Words between church members in the course of disciplinary proceedings, *Jarvis v. Hatheway*, 3 Johnson (New York), 180; 3 Am. Dec. 473. Saying that a voter put in two votes at town meeting, *Bradley v. Heath*, 12 Pickering (Mass.), 163; 22 Am. Dec. 418. A statement that the defendant believed that the plaintiff had stolen certain money, *Faris v. Starke*, 9 Dana (Kentucky), 128; 33 Am. Dec. 536. A statement that defendant believed that plaintiff had murdered defendant's son, *Stallings v. Newman*, 26 Alabama, 300; 62 Am. Dec. 723. A statement concerning the financial standing of a merchant to one proposing

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to sell him goods, *Sunderlin v. Bradstreet*, 46 New York, 188; 7 Am. Rep. 323, citing the principal case. A paper stating that defendant had been "robbed and swindled" by plaintiff and agreeing to share the expense of a criminal prosecution against him, *Klink v. Colby*, 46 New York, 427; 7 Am. Rep. 360, citing the principal case. A resolution, of an association of clergymen, of which both parties were members, adopted at the instance of defendant, imputing to plaintiff unclerical conduct, and inviting him to defend himself, *Shurtleff v. Stevens*, 51 Vermont, 501; 31 Am. Rep. 698, citing the principal case, and *Clark v. Molyneux*, L. R., 3 Q. B. Div. 237. A statement of the superintendent of the United States Naval Academy giving his reasons, required by law, why his proffered resignation should be accepted, *Maurice v. Worden*, 54 Maryland, 233; 39 Am. Rep. 384. A report of a committee of a lodge of Odd Fellows recommending the expulsion of plaintiff for perjury, *Kirkpatrick v. Eagle Lodge*, 26 Kansas, 384; 40 Am. Rep. 316. A petition to a town superintendent of schools protesting against his licensing the plaintiff as a teacher on the ground of his unfitness and bad character, *Wieman v. Mabee*, 45 Michigan, 484; 40 Am. Rep. 477; citing *Dickeson v. Hilliard*, L. R., 9 Ex. 79; *Harrison v. Bush*, 5 E. & B. 344. To the same purport, *Bodwell v. Osgood*, 3 Pickering (Mass.), 379; 15 Am. Dec. 229; *Harwood v. Keech*, 4 Hun (New York), 389. A list of discharged employees, giving reasons for discharge, circulated among other employees, *Missouri Pac. Ry. Co. v. Richmond*, 73 Texas, 568; 15 Am. St. Rep. 795. (Contra: *Bacon v. Mich. C. R. Co.*, *infra*.) An account given by a clergyman, at the instance of friends of a girl said to have been seduced by plaintiff, of the conduct of plaintiff while the clergyman knew him, *Rule v. Nass*, 79 Wisconsin, 321; 24 Am. St. Rep. 717, citing the principal case. A statement by a former employer to an existing or prospective employer of plaintiff that he had stolen from him, *Fresh v. Cutter*, 73 Maryland, 87; 25 Am. St. Rep. 575, citing *Rogers v. Clifton*, 3 Bos. & P. 587; *Pattison v. Jones*, 8 B. & C. 586. A statement by a cashier of a bank to a stockholder therein, respecting the financial standing of a surety on an official bond to the bank, *Rothholz v. Dunkle*, 53 New Jersey Law, 438; 26 Am. St. Rep. 432, citing *Lawless v. Anglo-Egyptian Oil Co.* L. R., 4 Q. B. Div. 262; *Philadelphia R. Co. v. Quigley*, 21 Howard (U. S. Sup. Ct.), 202; *Waller v. Lock*, 45 L. T., N. S., 243; JESSEL, M. R.: "If an answer is given in the discharge of a social or moral duty, or if the person who gives it thinks it to be so, that is enough; it need not even be an answer to an inquiry, but the communication may be a voluntary one." A letter to a Catholic priest stating that plaintiff is no longer a Catholic, *Gough v. Goldsmith*, 44 Wisconsin, 262; 28 Am. Rep. 579. A complaint by a church member that another member had committed perjury, made to bring about a trial, *Remington v. Congdon*, 2 Pickering (Mass.), 310. A letter written by a citizen concerning the fitness of a person for public office, and read at a meeting held to inquire concerning candidates, *Briggs v. Garrett*, 2 Atl. Rep. 527, citing the principal case, and *Quinn v. Scott*, 22 Minnesota, 456. A communication to the Governor of a State for the purpose of influencing his action on a legislative bill, *Woods v. Wiman*, 122 New York, 445; *Larkin v. Noonan*, 19 Wisconsin, 82. A memorial to the post-office department, charging plaintiff with fraud.

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Cook v. Hill, 3 Sandford (New York Superior Ct.), 341. The report of a committee of the College of Pharmacy in New York, in respect to the importation of spurious and adulterated drugs, *Van Wyck v. Aspinwall*, 17 New York, 190. A letter to the President complaining of a customs officer and requesting his removal, *White v. Nicholls*, 3 Howard (U. S. Sup. Ct.), 266. A "caution to the public," in a report of directors of an incorporated society against trusting a former agent, since dismissed, *Gassett v. Gilbert*, 6 Gray (Massachusetts), 94, the Court observing: "The precise limits within which the publication of defamatory matter is allowed, as being privileged by the occasion, are best defined by Baron PARKE in the leading case of *Toogood v. Spyryng*." A petition to a town council asking the removal of a constable because ignorant, unprincipled, spiteful, and violent, *Kent v. Bongartz*, 15 Rhode Island, 72; 2 Am. St. Rep. 870, citing *Hart v. Gumpach*, L. R., 4 P. C. 439; *Laughton v. Bishop*, &c., L. R., 4 P. C. 195. A reply to an inquiry by a post-office inspector concerning the fitness of an applicant for a post-office appointment, *Posnett v. Marble*, 62 Vermont, 481; 22 Am. St. Rep. 126, the Court observing: "The selection of suitable persons for the performance of official service is essential to the interests of both the government and the citizen. These interests can be protected only by the communication of information and by free discussion concerning the fitness of applicants. It would tend to repress this necessary freedom, and would be a manifest injustice to the citizen, if communications of this character subjected the persons making them to the payment of damages in the event of an honest mistake. But these considerations disclose no necessity for a privilege broad enough to cover charges which are unfounded and malicious."

The first principal case is cited as "the leading case," with many others, in *Chaffin v. Lynch*, 83 Virginia, 118; 84 *ibid.* 887.

The following have been held not privileged: A libellous letter written by a clergyman to an association of clergymen of which he is not a member, concerning one of its members, *Shurtleff v. Parker*, 130 Massachusetts, 293; 39 Am. Rep. 454. A letter from a minister to a woman, who was formerly but not then his parishioner, cautioning her not to marry the plaintiff, *Joannes v. Bennett*, 5 Allen (Mass.), 169; 81 Am. Dec. 738. *Byam v. Collins*, 111 New York, 143; 7 Am. St. Rep. 727, is to the same purport, cites the principal case and reviews many other English and American cases. One judge dissented. A list of discharged employees, stating reasons for discharge, furnished by defendant to its employees, *Bacon v. Michigan C. R. Co.*, 55 Michigan, 221; 54 Am. Rep. 372. (*Contra*: *Mo. P. Ry. Co. v. Richmond*, *supra*.) A declination to serve on a church committee to prepare a Christmas festival on the ground that another member had a venereal disease and had been intimate with plaintiff, *York v. Johnson*, 116 Massachusetts, 482. A false report of financial standing, furnished by a mercantile agency to subscribers generally without request, *Pollasky v. Minchener*, 84 Michigan, 280; 21 Am. St. Rep. 516; *King v. Patterson*, 49 New Jersey Law, 117; 60 Am. Rep. 622; *Johnson v. Bradstreet Co.*, 77 Georgia, 172; 1 Am. St. Rep. 77; *Bradstreet Co. v. Gill*, 72 Texas, 115; 13 Am. St. Rep. 768. A libellous letter in answer to a claim presented by plaintiff's attorneys, *Alabama, &c. Ry. Co.*

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v. Brooks, 69 Mississippi, 168; 30 Am. St. Rep. 528, citing the principal case. A statement of a farming landlord to his tenants that a neighbouring farmer was a horse thief, *Dillard v. Collins*, 25 Grattan (Virginia), 343. A false charge of larceny by a relative of defendant of the defendant's property, *Moore v. Butler*, 48 New Hampshire, 161; citing *Pattison v. Jones*, 8 B. & C. 580. A letter from a creditor to the husband of his debtor, a rich man, informing him of her bad conduct, for the purpose of compelling her to pay an ante-nuptial debt which she had ungratefully repudiated, *Beals v. Thompson*, 119 Massachusetts, 405. A letter from one dealer to another cautioning him to look out for a third because he will not pay, *Brown v. Tannaman*, 85 Wisconsin, 451; 39 Am. St. Rep. 860; "It does not appear that the defendant had any legitimate interest in the business conducted by the plaintiff, nor in the purchases made by him from the person to whom the letter was addressed, nor was he under any obligation or duty to make the communication, nor was the communication made in the interest of the public or good morals, but on the contrary, the defendant wrote and published the letter as a mere volunteer, acting from motives of personal gain to be secured through the injury of a rival in business. It certainly does not answer the description of either the second, third, or fourth kinds of privileged communications mentioned by Mr. Justice DANIEL, and held by the Supreme Court of the United States in the case cited. We think it is equally clear that it does not fall within the first kind there defined."

In *St. James Military Academy v. Gaiser*, 125 Missouri, 517; 28 Lawyers' Rep. Annotated, 667, it was held that a publication, in newspapers, by the resident clergyman of Macon, in respect to an academy where dancing was practised at receptions and a dancing school taught, to the effect that they "regarded the institution under such administration as harmful to the moral and religious interests" of the community, and that they urged members of their churches and friends of good morals to absent themselves from and discountenance all receptions and other gatherings at the academy as long as dancing is allowed in the building, is sufficient to sustain an action for libel.

Mr. Justice DANIEL, in *White v. Nicholls*, 3 Howard (U. S. Sup. Ct.), 266, citing *Wright v. Woodgate*, 2 C. M. & R. 577, laid down the following as the recognized occasions of privileged communications:—

"The exception relied upon belongs to a class which, in the elementary treatises and in decisions upon slander and libel, have been denominated privileged communications or publications. They are as follows: 1. Whenever the author or publisher of the alleged slander acted in the *bonâ fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests. For example, words spoken in confidence or friendship as a caution, or a letter written confidentially to persons who employed A. as a solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had entrusted to him, and in which the writer of the letter was also interested. 2. Anything said or written by a master in giving the character of a servant who has been in his employment. 3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used. 4. Pub-

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lications duly made in the ordinary mode of parliamentary proceedings. These are the acknowledged exceptions to the general rule."

There is more difficulty as to the second branch of the Rule, there being difference as to the admissibility of such evidence with regard to the words being spoken before or after suit, and as to whether they may be allowed to affect the damages.

The second principal case is cited in *Newell on Defamation*, p. 778, and to the doctrine laid down in the second branch of the Rule the first principal case is cited in *Garrett v. Dickerson*, 19 Maryland, 450, with other English cases, and the following observations: "In passing upon the question of express malice, evidence of any other words or acts having reference to the subject-matter of the actionable words, may be submitted to the jury for the same purpose, whether such other words or acts were spoken and done before or after suit brought."

In *Kennedy v. Gifford*, 19 Wendell (New York), 296, the Court spoke of "the propriety with which such evidence has been allowed by the cases, to prove the *quo animo*, so long as the subsequent conversations were confined to the subject of the original defamation."

In *Wallis v. Mease*, 3 Binney (Penn.), 546, it was held that the plaintiff may prove other words, actionable in themselves, and spoken since suit brought, to show malice, but not to enhance damages. One Judge said: "The speaking of the same words after suit brought, would raise a presumption in support of what was alleged, that such words had been spoken before suit brought; and on the same principle, would raise a presumption that they had been spoken maliciously." Another said: "If it were not so settled, I should very much doubt the propriety of such evidence, because it may take the plaintiff by surprise; nor does it seem clear that the malice of the defendant's heart at the time of speaking the words for which the suit is brought, can be fairly inferred from words spoken at a subsequent time, no way relating to those which are the cause of action."

In *Duwall v. Griffith*, 2 Harris & Gill (Maryland), 30, it was held that subsequent words, of a similar purport to those declared on, might be proved to show malice. See *Markham v. Russell*, 12 Allen (Mass.), 573; *VanDerveer v. Sulphin*, 5 Ohio State, 293; *Beals v. Thompson*, 149 Massachusetts, 405.

The republication of a newspaper article, after the commencement of an action charging it to be libellous, with comments thereon by defendant, may be evidence of malice. *Welch v. Tribune Pub. Co.*, 83 Michigan, 661; 21 Am. St. Rep. 629.

Where a physician sued a priest for slander, it was held proper to prove, in aggravation of damages, that after the action was brought, the defendant referred to it in presence of his congregation, and said, "We shall see if the church shall destroy the vermin or the vermin the church." *Morassee v. Brochu*, 151 Massachusetts, 567; 21 Am. St. Rep. 474, citing *Beals v. Thompson*, 149 Massachusetts, 405.

In *Bohwell v. Swan*, 3 Pickering (Mass.), 376, the Court observed: "As to the admission of evidence on the part of the plaintiff, of a repetition of the slanderous words even after the commencement of the suit, it is a diffi-

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cult question. Lord KENYON in *Charlter v. Barret*, Peakes Cas. 22, admitted such evidence. In the case of *Mead v. Daubigny*, p. 125 of same book, he refused it. Again in *Lee v. Huson*, *ibid.*, 166, he admits other libels to be proved. Lord ELLENBOROUGH, in *Rustell v. Macquister*, 1 Campb. 48, note, admitted it, saying, the judge must tell the jury not to give damages for it. SPENCER, J., in 7 Johns. R. 270, disapproved of the rule. TILGHMAN, C. J., in *Finerty v. Tipper*, 2 Campb. 75, zealously opposes the general doctrine, and yet seems to admit that all the cases were decided right."

"According to MANSFIELD, C. J., a repetition of the same words, or the same libel, may be proved, to show that the first was not heedless, but malicious; and we think that so far we may go; but we cannot agree, that if a man sue another for calling him a thief, he may prove that at another time afterwards he called him a murderer. This is a distinct calumny, for which the plaintiff has a right to his action, and though it may tend to prove malice as to the first words, so also will it necessarily go to enhance the damages; for no jury can say how much or how little of the damages were given on account of this second charge. The words proved in the case before us to have been spoken after the first and since the commencement of the suit, were of similar import with those charged in the declaration, and therefore may be considered as a repetition, and so admissible in evidence."

In *Frazier v. McCloskey*, 60 New York, 337, the Court said: "We think that the Court below erred in admitting evidence of slanderous words uttered by the defendant after the commencement of this action. It was claimed that this evidence was admissible for the purpose of showing malice and enhancing the damages for the speaking of the words charged in the complaint. It has been decided that a repetition of the words charged in the complaint, or the speaking of them at times other than those stated in the complaint, may be shown; but in all these cases, the occasions on which the slanders were uttered were before the commencement of the action. In *Root v. Lowndes* (6 Hill, 518, 519) the admissibility of the evidence was placed, by BRONSON, J., upon the ground that the judgment would be a bar to another action. In *Titus v. Sumner*, (44 N. Y. 266), evidence was admitted that the same slanderous charge was made by the defendant at times prior to those laid in the complaint; but the ruling was sustained by the Commission of Appeals solely on the ground that at the time of the trial an action for such prior slander was barred by the statute of limitations. The same decision was made, and for the same reason, in *Inman v. Foster* (8 Wend., 602). The plaintiff should never be permitted to give in evidence words which might be the subject of another action. (6 Hill, 518, *supra*, per BRONSON, J.; *De Fries v. Davis*, 7 C. & P. 112, per TINDAL, Ch. J.) The reason is obvious; the defendant might be compelled to pay damages twice for the same injury. In the present case, the words allowed to be proven, being actionable *per se*, and having been spoken after the commencement of the action, a second action would have been clearly maintainable for them. They were spoken in Sept. 1872. This action was commenced in February, 1871. In *Keenholts v. Becker* (3 Denio, 346), it was expressly adjudicated that words spoken after the commencement of the action were not admissible to aggravate the damages; and we see no reason to question the correctness of that decision."

Mr. Newell is of opinion that repetitions may be proved for the mere purpose of showing malice. (Defamation, p. 349.) He cites *Hinkle v. Davenport*, 38 Iowa, 355; *Commonwealth v. Damon*, 136 Massachusetts, 448; *Behee v. Mo. Pac. R. Co.* 71 Texas, 424, (even words subsequent to the bringing of the action), *Bassell v. Elmore*, 48 New York, 561; *Gribble v. Pioneer Press Co.*, 34 Minnesota, 342.

Mr. Townshend is of the same opinion (Slander and Libel, sect. 391), citing also *Mir v. Woodward*, 12 Connecticut, 262; *Smith v. Wyman*, 4 Shepley (Maine), 13; *Miller v. Kerr*, 2 McCord (So. Car.), 285; *Hansbrough v. Stinnett*, 25 Gratian (Virginia), 495; *Saunders v. Baxter*, 6 Heiskell (Tennessee), 369; *Rea v. Harrington*, 58 Vermont, 181; but he admits that as to words subsequent to suit the authorities are in conflict. Citing *Carter v. McDowell*, Wright (Ohio), 190; *McDonald v. Murchison*, 1 Devereux Law (No. Car.), 7; *Howell v. Cheatham*, Cooke (Tennessee), 247; *Teagle v. Deboy*, 8 Blackford (Indiana), 134; *Elliott v. Boyles*, 31 Pennsylvania State, 65; *State v. Jeandell*, 5 Harrington (Delaware), 475; *Caranagh v. Austin*, 42 Vermont, 576; *Taylor v. Moran*, 4 Metcalfe (Kentucky), 127.

Where words actionable in themselves, and not alleged, are shown to prove malice, the jury must be cautioned not to increase damages on their account. *Letton v. Young*, 2 Metcalfe (Kentucky), 558; *Scott v. McKinnish*, 15 Alabama, 662; *Burson v. Edwards*, 1 Carter (Indiana), 164.

On the other hand it has been held that the damages may thus be enhanced, *Bassell v. Elmore*, 48 New York, 561; *Gribble v. Pioneer Press Co.*, 34 Minnesota, 342; *Jean v. Hennessey*, 69 Iowa, 373.

Evidence of a charge of a different nature and at a different time from that alleged is inadmissible for any purpose, *Howard v. Sexton*, 1 New York, 157. In *Upton v. Hume*, 24 Oregon, 420; 41 Am. St. Rep. 863, it was said: "Upon this question the authorities are in conflict, but in our opinion, the better rule seems to be that where the subsequent words or publication impute the same crime, or may fairly be considered as a renewal of the original charge, they may be given in evidence, as tending to show express malice, and to enhance the damages: *Leonard v. Pope*, 27 Mich. 145; but that evidence cannot be given of actionable words spoken or published on another occasion, and charging a separate and distinct crime from that charged in the complaint, for the purpose of showing malice, or for any other purpose, for the reason, as stated by PARKER, C. J., that this is a different calumny for which the plaintiff has a right to his action, and though it may tend to prove malice as to the first words, so also will it necessarily go to enhance the damages, for no jury can say how much or how little of the damages were given on account of this second charge. *Bodwell v. Swain*, 3 Pick. 376. To the same effect are *Root v. Lowndes*, 6 Hill, 518; 41 Am. Dec. 762; *Howard v. Sexton*, 1 N. Y. 157; *Frazier v. McCloskey*, 60 N. Y. 337; 19 Am. Rep. 193; *Distin v. Rose*, 69 N. Y. 122; *Barr v. Hack*, 46 Iowa, 308. This is recognized as the better rule by Mr. Townshend in his work on Libel and Slander, section 392; and in a note to Odgers on Libel and Slander, at page 271, Mr. Bigelow, a writer of recognized learning and ability, after a careful review of the authorities in this country, reaches the conclusion that: 'By the better

No. 7. — *Zenobio v. Axtell*, 6 T. R. 162. — Rule.

authorities evidence of the publication of defamation upon the plaintiff other in substance than that sued for is not admissible on grounds of policy.' The distinction between the admissibility as evidence of charges of a nature different from those in suit and the repetition of the charges made in the complaint seems to be put upon the ground that a repetition of the libel or slander and the original offence may be practically treated as one wrong, and as to the repetitions used in evidence, all barred by the one judgment: *Leonard v. Pope*, 27 Mich. 115; *Root v. Lowndes*, 6 Hill, 518; 41 Am. Dec. 762; and *Frazier v. McCloskey*, 60 N. Y. 337; 19 Am. Rep. 193, which obviously could not be true of the publication of a different charge. The repetitions made use of in evidence in a particular trial are treated as barred by the judgment, because the jury are presumed to have considered them in estimating the damages for the original publication. If however charges of a different nature are admitted in evidence for the purpose of showing *animus*—and they certainly could not be competent for any other purpose—the jury may indeed be instructed that they must not give damages therefor, yet as has been remarked, such instruction will be wasted upon the average, and perhaps upon a highly cultivated jury. *Root v. Lowndes*, 6 Hill, 518; 41 Am. Dec. 762. For this reason it is thought best to hold that 'such evidence is not admissible for any purpose.'

SECTION IV. — *Pleadings and Evidence in support of Action.*No. 7. — *ZENOBIO v. AXTELL*.

(K. B. 1795.)

No. 8. — *COOK v. COX*.

(K. B. 1814.)

RULE.

BOTH in libel and slander the actual words used must be set out in the pleadings or the particulars, and proved.

Zenobio v. Axtell.

6 T. R. 162-163 (s. c. 3 R. R. 142).

Defamation. — Libel. — Pleading.

In an action for a libel written in a foreign language, the plaintiff [162] must set forth the libel in the original; and if he only set out a translation of it, the Court will arrest the judgment.

This was an action for a libel. The declaration contained three counts; the defendant suffered judgment to go by default; and after the plaintiff had instituted a writ of inquiry, upon which the jury gave £100 damages generally, the defendant moved in arrest of judgment, for the insufficiency of the third count, which was as follows; that the defendant, envying the happy state and condition of the plaintiff, and further contriving and maliciously intending wrongfully and unjustly to injure and prejudice the plaintiff in his said good name, fame, credit, and reputation, and to bring him into public scandal, disesteem, and disgrace, on, &c., at, &c., falsely and maliciously, wilfully, wrongfully, and designedly, published and caused to be published a certain other false, scandalous, malicious, defamatory, and opprobrious libel, of and concerning the said plaintiff, in the French language, in a certain newspaper, commonly called and known by the name of *Courier de Londres*, and which said false, scandalous, malicious, defamatory, and opprobrious libel is according to the purport and effect following in the English language: that is to say, "The late famous Bishop of Autun, to the great satisfaction of all honest men, has just received an order to quit England: the same compliment has been paid to an adventurer, a great gambler, who calls himself the Count Zenobio;" by means of the publishing of which said false, &c., the plaintiff is greatly injured, &c.

Wathen moved to arrest the judgment, on account of the insufficiency of the third count, to which he made three objections: 1st. That the original paper, as written in the French language, should have been set out in this count; 2dly, That [* 163] * the publication itself was not libellous; and 3dly, That it was not charged with sufficient certainty to relate to the plaintiff.

Reader, in answer to the first objection, said that though in cases of this sort the libel was usually set out in the language in which it was written, it was not absolutely necessary, it being sufficient to set forth the translation; and that if it were not properly translated, the defendant might take advantage of it on the trial, since in such a case he could not be said to have written the libel imputed to him.

Lord KENYON, C. J. It is unnecessary to argue the other points, if this objection be fatal; and that this objection must prevail is evident from the uniform current of precedents, in all of which

No. 8. — *Cook v. Cox*. 3 M. & S. 110.

the original is set forth. The plaintiff should have set out the original words, and then have translated them, showing their application to him.

But the Court gave the plaintiff leave to amend his declaration, on payment of costs.

Cook v. Cox.

3 Maule & Selwyn, 110-117 (s. c. 15 R. R. 432).

Defamation. — Slander. — Pleading.

In a declaration for slander of plaintiff in his trade, a count alleging that [110] the defendant, in a certain discourse in the presence and hearing of divers subjects, falsely and maliciously charged and asserted and accused plaintiff of being in insolvent circumstances, and stating special damage, but without setting out the words, is ill, and if it be joined with other counts, which set out the words, and a general verdict given, the Court will arrest the judgment.

Slander. The plaintiff declares that whereas before and at the time of speaking and publishing the defamatory words by the defendant as hereinafter mentioned, he (the plaintiff) carried on the business of a baker, and had not been suspected to be insolvent, or unable to pay his just debts, or likely to become a bankrupt, *per quod* he had obtained the good opinion of his neighbours, &c., and was daily and honestly acquiring in the way of his trade great gains, yet the defendant, well knowing, &c., in a certain discourse which the defendant had with the plaintiff, in the presence and hearing of divers subjects, falsely and maliciously spoke and published to, and of, and concerning the plaintiff, in the way of his trade and business, these false, &c., words, "You owe several millers money, and they are at your house every day for money, and you are not worth a penny." — Second count; for speaking these words: "You are not worth a penny." — Third count; that the defendant, in a certain other discourse, &c., in the presence and hearing of the said last-mentioned subjects, falsely and maliciously charged, and asserted, and accused the plaintiff of being in bad and insolvent circumstances. By means of committing which said grievances by the defendant, the plaintiff hath been greatly injured in his trade and business, and divers subjects, to whom the solvency and good circumstances of the plaintiff were unknown, have suspected the plaintiff to be insolvent, and unable to pay his just debts, and likely to be a bankrupt, and have

[* 111] refused to have any *transaction in the way of business, or otherwise, with the plaintiff, and in particular one of the said subjects, to wit, R. P., who used to sell and deliver to the plaintiff goods in the way of his trade, hath, ever since the committing of the said grievances by the defendant, wholly refused, and still doth refuse to deliver any goods to the plaintiff on credit, and for want of such goods the plaintiff hath been injured in the way of his trade, &c. Plea not guilty.

After a general verdict for the plaintiff upon all the counts, with 40s. damages, at the last assizes for Devon, it was moved in Easter term, by Gaselee, in arrest of judgment, that the words ought to have been set forth in the last count, and that for this defect the count was too general, and uncertain.

Gifford, on a former day in this term, showed cause, and cited 1 Ventr. 264. Anon., see also 1 Show. 282, Com. Dig., Action upon the Case for Defamation, (D. 4), and the language of Lord HARDWICKE in *Nelson v. Dixie*, Cas. temp. Hardw. 305, in support of this general mode of declaring. And he further contended, that supposing this would have been bad upon demurrer, yet here it was cured by the verdict; and he referred to Serjt. Williams's note, 1 Saund. 228, for the rule "that where there is any omission in pleading which would have been fatal on demurrer, if the issue joined be such as necessarily required on the trial proof of the facts so omitted, and without which it is not to be presumed that either the Judge would direct the jury to give, or the jury would have given the verdict, such omission is cured by the verdict by the common law." Also Com. Dig., Action on the Case for

[* 112] * Defamation, (D. 30). "Any words by which the party has a special damage are actionable." And here the plaintiff has alleged a special damage; and after verdict it must be taken that such damage was proved, and that it was also proved that the defendant spoke words which amounted to a charge of insolvency, for so in substance the declaration alleges; and unless that had been proved it is not to be presumed that either the Judge would have directed, or the jury would have found the verdict. Thus in *Ward v. Harris*, 2 Bos. & P. 265, the generality of the declaration was held to be cured by the verdict; but otherwise in *Andrews v. Whitehead*, 13 East, 102, where objection was taken on special demurrer.

Pell, Serjt., and Gaselee, *contra*, argued that the declaration ought

to have laid the particular words spoken, Com. Dig., Action on the Case for Defamation, (G. 6), and that for this defect the Court after verdict would arrest the judgment. And for a like defect in *Hale v. Cranfield*, Cro. Eliz. 645, after verdict, judgment having been entered for the plaintiff without the privity of the Court, the Court commanded that the roll should be amended. Also in *Newton v. Stubbs*, 2 Show. 435 ; 3 Mod. 71, which was since the stat. of jeofails, 16 & 17 Car. II. c. 8, the words being laid *ad effectum sequentem*, the Court for that very reason after verdict stayed the judgment. And though the report in Show. adds a *quere*, yet it appears that it was moved afterwards, and again judgment given for the defendant.

Cur. adv. vult.

* Lord ELLENBOROUGH, C. J., on this day delivered the [* 113] judgment of the Court.

This is an action of slander, which was tried at the last assizes for the county of Devon. On not guilty pleaded, a general verdict was found for the plaintiff on all the counts of the declaration, with 40s. damages. A motion has been made in arrest of judgment, on an objection to the last count, as to which the declaration is as follows: the plaintiff states himself to be a baker, never to have been suspected of insolvency, and to have carried on his business with profit; that the defendant, contriving to injure him, and to make it be believed that he was in bad and insolvent circumstances, and unable to pay his just debts, in a certain discourse which he held in the presence and hearing of certain subjects, at the time and place mentioned in the declaration, in the presence and hearing of the same subjects, falsely and maliciously charged and asserted, and accused the said plaintiff of then and there being in bad and insolvent circumstances, by which the plaintiff is injured in his said business, has sustained loss generally, and has also lost one customer particularly named. The objection is, that in a count for slander by words, the words themselves should be set out, in order that the defendant may know the certainty of the charge and may be able to shape his defence, either on the general issue or by plea of justification accordingly, and that this defect is not cured by verdict. On the other hand, it is said that this is no great inconvenience to the defendant, as he might certainly have demurred to the declaration with success: but it is contended, that this defect is cured by the verdict; that the charge of having

[* 114] spoken words injuring the plaintiff in his trade is * well laid in substance, and though the particular words are not set out, yet it must be presumed, after verdict, that such words or acts were proved, as if specially alleged would have supported that charge; otherwise the verdict could not have passed for the plaintiff. The first thing to consider is, what the allegation is, and by what evidence it might have been proved. The complaint is, that in a discourse held in the hearing of many, the defendant charged and asserted and accused the said plaintiff of being in bad and insolvent circumstances. The insertion of the word "asserted" is not very grammatical. This charge might certainly have been proved by evidence of words only, but if the words had not been actionable in their ordinary import, but only by reference to some act or gesticulation, such as holding up an empty purse, or the like, it would have been open to the plaintiff to have maintained this allegation, made in such terms, by evidence of acts giving a slanderous meaning to words which in themselves might import no slander. If the allegation had been, that he charged and accused the plaintiff of insolvency by word or act, the count would undoubtedly have been bad; and yet the same answer would apply, that one of the alternatives must have been proved, or the verdict could not have passed for the plaintiff, and that either mode of slander is actionable. As this count is expressed, it could not have been proved by evidence of a slander by acts alone not accompanied with words; but it might have been proved either by words alone, or by words coupled with acts. The allegation then amounts to this, that the defendant by words, *or* by words coupled with acts, slandered the plaintiff in his trade; and therefore it is bad, and not cured by verdict, as a charge in the [* 115] * alternative. But supposing it to be taken as a charge of oral slander only, the weight of authorities is against the setting out words by their effect only. This count is equivalent to an allegation that the defendant used certain words to the effect of imputing insolvency to the plaintiff. The case of *Newton v. Stubbs*, 2 Show. 435, which was moved twice, and was settled after much debate, is an express authority that a count for using words to the effect following, &c., is bad after verdict: the Court there admit that it must be taken for granted that the defendant "spoke the sense of the words mentioned in the declaration," which, as no words were there set out, must mean that he spoke words to the

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sense and effect mentioned in the declaration. This case was decided since the stat. of Car. II., though this does not seem to be a case within that statute. This doctrine is very much confirmed by the case of *Zenobio v. Astell* (p. 87, *ante*), 6 T. R. 162 (3 R. R. 142), which was an action for a libel written in the *French* language, and “which said libel is, according to the purport and effect following, in the *English* language, that is to say,” &c.: after judgment by default, the judgment was arrested on the objection that the paper, as written in the *French* language, should have been set out; Lord KENYON says, “that this objection must prevail is evident from the uniform current of precedents, in all of which the original is set forth;” and the judgment was arrested. It is true, that that was a case where the judgment was by default, and there are some cases where a defect is cured by a verdict, which is fatal on such a judgment; but that was not one of those defects: no evidence before the jury could have operated so as to supply the want of the allegation of the words in the original language. This case *also furnishes another objection to the count in the [* 116] present case, that the allegation, as expressed in the count, might have been maintained by the proof of words in any language. Ten judges in *Dr. Sacheverell's case*, 5 State Trials, 828, delivered an unanimous opinion (no others being present) that “by the law of England and constant practice, in all prosecutions by indictment or information, for crimes or misdemeanors by writing or speaking, the particular words supposed to be criminal ought to be expressly specified in the indictment, or information.” There seems to be no reason for any difference in this respect between civil and criminal cases, the action arises *ex delicto*. The words supposed to be used by Lord HARDWICKE in *Nelson v. Divie*, Cas. temp. Hardw. 305, were merely thrown out at *nisi prius*, and not material to the point ruled by him in that cause; and they are evidently founded on a mistake, as there are no such precedents in Rastall as he supposes. Unless the very words are set out, by which the charge is conveyed, it is almost, if not entirely impossible to plead a recovery in one action in bar of a subsequent action for the same cause. Identity may be predicated with certainty of words, but not of the effect of them as produced upon the mind of a hearer. It has been said, that this is not like the case of a defective title, but is more analogous to that of a title defectively set out. If, however, the authorities cited are law, and they are supported by

more ancient ones, it is of the substance of a charge for slander by words that the words themselves should be set out with sufficient innuendoes and a sufficient explanation if required to make them intelligible: it is of the substance of a charge of slander of [*117] any sort that *it should not be laid in the alternative.

Upon the whole, we think that this count is so defective in substance, that no intendment can be made, to supply its defects, from what can be presumed to have passed at the trial; and consequently that the judgment must be arrested.

ENGLISH NOTES.

It is not enough to give the substance of the alleged libel or slander. *Newton v. Stubbs*, 3 Mod. 71; *Wood v. Brown* (1815), 6 Taunt. 169, 16 R. R. 597. In the last mentioned case, the plaintiff's declaration was that the defendant wrote something concerning the plaintiff "purporting that the plaintiff's beer was of a bad quality and sold by deficient measure, and that his other liquors and the treatment of his guests were bad, &c." The Court gave judgment for the defendant. In *Wood v. Adam* (1830), 6 Bing. 481, the words complained of by the plaintiff as imputed to him by the defendant, were "That *he had* three or four cargoes of oranges on the way from Gravesend." The witnesses proved only that the defendant alleged the plaintiff to have given out that *there were* three or four ships coming up with fruit. The variance was held to be fatal. In *Harris v. Warre* (1879), 4 C. P. D. 125, 48 L. J. C. P. 310, 40 L. T. 129, 27 W. R. 461, Lord COLERIDGE decided that, in spite of Ord. XIX. rules 4 & 24, the precise words of the libel must be set out in the statement of claim.

In *Reg. v. Bradlaugh* (1878), 3 Q. B. D. 607, 48 L. J. M. C. 5, the defendant was found guilty upon an indictment for publishing an indecent libel in his book called the *Fruits of Philosophy*. The indecent passages were not set out in the indictment. The Court for Crown Cases quashed the conviction on the ground that the obscene passages charged were not set out. Now by section 7 of the Libel Law Amendment Act 1888, obscene passages need not be set out. It is sufficient if the book, newspaper, &c., is deposited in Court and the objectionable passages are clearly indicated.

If the slander was in the form of a question, the very question must be set out with an innuendo. It will not do to turn the question into a fact affirmed. *Barnes v. Holloway* (1799), 8 T. R. 150.

So if a libel is contained in two or more successive letters, and neither of them is complete without the others, all the letters must be set out. *Solomon v. Lawson* (1846), 8 Q. B. 823, 15 L. J. Q. B. 253.

The whole of a libellous article in a newspaper must be produced if the passages alleged to be libellous are not clear, or where the rest of the article would vary the meaning. *Cartwright v. Wright* (1822), 5 B. & Ald. 615, 24 R. R. 495; *Buckingham v. Murray* (1825), 2 C. & P. 46. But if the omitted parts would not vary the meaning, the omission is not fatal. *Rutherford v. Evans* (1830), 6 Bing. 451. There the libel charged the plaintiff with being the most artful scoundrel that ever existed, and with being insolvent, but the writer added that he had never disclosed the matter, nor ever would, except to the person whom he addressed. The declaration for libel omitted this addition. TINDAL, C., J., said, "We take the rule to be that if the omission of any part makes a material alteration in the sense of the part inserted, such omission is fatal. And if, in this case, the part of the letter which had been omitted had contained any qualification of the meaning of the part set out, or if any real substantial difference of construction would have arisen upon the whole of the letter when set out on the record, we should have held the omission of such part constituted a variance which might be taken advantage of by the defendant. But upon the consideration of the whole letter, it appears to us that the charge imputed by it remains precisely the same as that which is contained in the part set out." The omission was held to be immaterial.

In *Rainy v. Bravo* (1872), L. R., 4 P. C. 287, 27 L. T. 249, 20 W. R. 873, the defendant had, after the publication of a libel, but before the action was brought, destroyed the letter containing the libel. It was held that secondary evidence of the contents of the letter by witnesses who heard it read was admissible, but that the actual words as laid in the declaration must be proved, and not the substance or impression the witnesses received of the words.

If the plaintiff cannot otherwise discover the exact words used, the defendant may be interrogated. *Atkinson v. Fosbrooke* (1866), L. R., 1 Q. B. 628, 35 L. J. Q. B. 182, 14 L. T. 553, 14 W. R. 832. The interrogatory is allowed only after delivery of the statement of claim, except in special circumstances. *Strange v. Dowdney* (1874), 38 Justice of the Peace, 724, 756.

When a libel in a foreign language is translated the exact translation may be given, and care should be taken not to translate actionable into non-actionable words, as happened in *Ross v. Lawrence* (1651), Styles, 263.

AMERICAN NOTES.

Mr. Townshend cites both principal cases to the doctrine that the complaint should set out the very words published, and cites *Whitaker v. Freeman*, 1 Devereux Law (Nor. Car.), 271; *Lee v. Kane*, 6 Gray (Mass.), 495; *Taylor*

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v. *Moran*, 4 Metcalfe (Kentucky), 127; *Walsh v. State*, 2 McCord (So. Car.), 218; *Commonwealth v. Wright*, 1 Cushing (Mass.), 16.

In Pennsylvania it is sufficient to set out the purport of the words. *Lukehart v. Byerly*, 53 Penn. St. 418. And so in Massachusetts, as to a crime, as stealing. *Pond v. Hartwell*, 17 Pickering, 269.

The first principal case is cited by Newell on Defamation, p. 277, and its doctrine is supported by *Warmouth v. Cramer*, 3 Wendell (New York), 394. *Pelzer v. Bemish*, 67 Wisconsin, 291; *Simonson v. Herald Co.*, 61 *ibid.* 626; *Kerschlaugher v. Slusser*, 12 Indiana, 453.

It is not enough to charge that the words were in substance, or to the purport and effect, or in manner, or in manner and form, or of the tenor, import, and effect as follows. *Bagley v. Johnson*, 4 Richardson Law (So. Car.), 22; *Watson v. Music*, 2 Mississippi, 229; *Zeig v. Cot*, 3 Chandler (Wisconsin), 26; *Bassett v. Spofford*, 11 New Hampshire, 127; *Churchill v. Kimball*, 3 Hammond (Ohio), 409; *Forsyth v. Edmiston*, 5 (New York Superior Ct.), 653. Nor are mere quotation marks sufficient. *Com. v. Wright*, 1 Cushing (Mass.), 46.

The matter is regulated by statute in some States, but under the Codes generally, requiring a statement of the "facts," the precise words must be averred, and not simply their purport or substance.

A count is bad that merely alleges that the defendant charged the plaintiff with the crime of forgery, or of perjury, or of theft, *Fundt v. Fundt*, 12 Sergeant & Rawle (Penn.), 427; *Ward v. Clark*, 2 Johnson (New York), 10; *Parsons v. Bellew*, 6 New Hampshire, 289 (even after verdict); but *contra*, *Hill v. Miles*, 9 *ibid.* 9; and an allegation of the speaking of certain words set forth, "or words of the same import," was held good after verdict in *Bill v. Bugg*, 4 Munford (Virginia), 260.

As to proof: some Courts hold it sufficient to prove the words substantially as laid; others hold that all need not be proved, yet equivalents will not answer. *Posnett v. Marble*, 62 Vermont, 481; 22 Am. St. Rep. 126; *Bundy v. Hart*, 46 Missouri, 480; 2 Am. Rep. 525; *Baker v. Young*, 41 Illinois, 42; 92 Am. Dec. 119; *Hersh v. Ringwalt*, 3 Yeates (Penn.), 508; 2 Am. Dec. 392; *Hume v. Arrasmith*, 1 Bibb (Kentucky), 165; 1 Am. Dec. 626; *Treat v. Browning*, 4 Connecticut, 188; 10 Am. Dec. 156; *Wheeler v. Robb*, 1 Blackford (Indiana), 330; 12 Am. Dec. 245; *Estes v. Antrobus*, 1 Missouri, 197; 13 Am. Dec. 196; *Purple v. Horton*, 13 Wendell (New York), 9; 27 Am. Dec. 167; *Commons v. Walters*, 1 Porter (Alabama), 377; 27 Am. Dec. 635; *Slocumb v. Kuykendall*, 1 Scammon (Illinois), 187; 27 Am. Dec. 761; *Snick v. Kelley*, 25 Indiana, 278; 87 Am. Dec. 362; *McConnell v. McCoy*, 7 Sergeant & Rawle (Penn.), 223 (proof of words spoken in the second person will not sustain a charge of speaking in the third person).

In *Bundy v. Hart*, *supra*, the charge was, "He had to leave Indiana for burning;" the proof was, "I think my character is about as good as Bundy's; I had n't to leave Indiana for burning a barn." Held, a fatal variance. In *Posnet v. Marble*, *supra*; the charge was of keeping "a common open house;" the proof was, "a stinking place;" held, a fatal variance. On the other hand, the charge "the plaintiff had a bastard child" was held sup-

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ported by proof of "If I have not been misinformed, the plaintiff had a bastard child." *Treat v. Browning, supra.*

In a note, 12 Am. Dec. 246, Mr. Freeman comes to the conclusion that in Indiana, Missouri, Illinois, Vermont, Kentucky, and Tennessee, equivalent words will not support a charge of slanderous words; but that "proof of words of the same sense and import" will suffice in Connecticut, Massachusetts, Ohio, New Hampshire, Iowa, Kentucky, and under the Code in New York and North Carolina. Citing many cases. Mr. Newell gives many illustrative cases. (Defamation, p. 808.)

So "A. has had a baby," is sustained by "We hear bad reports about some of your girls. A. has had a baby," &c. *Robbins v. Fletcher*, 101 Massachusetts, 115. "He stole two hundred dollars from me when I was drunk," is sustained by proof omitting the last four words, but not by "Morrissey stole two hundred dollars," or "is a thief." *Crotty v. Morrissey*, 40 Illinois, 477. "He has perjured himself; he swore lies before the Court at Madison," is sustained by proof adding "according to the churchbook." *Brown v. Hanson*, 53 Georgia, 632. "Public whore" is sustained by "whorish bitch." *Zimmerman v. McMakin*, 22 South Carolina, 372; 53 Am. Rep. 720. Charge of burning his own mill "because he was poor and wanted the money," is sustained by proof of "to get his insurance." *Chace v. Sherman*, 119 Massachusetts, 387.

Mr. Townshend says (Slander and Libel, sect. 365): "The plaintiff need not prove all the words laid, but he must prove enough of them to sustain the action. It is sufficient if the gravamen of the charge as laid is proved, and unless the additional words qualify the meaning of those proved so as to render the words proved not actionable, the proof is sufficient. It is necessary for the plaintiff to prove some of the words precisely as charged, but not all of them, if those proved are in themselves slanderous; but he will not be permitted to prove the substance of them in lieu of the precise words." Mr. Townshend treats this topic extensively, giving very interesting parallel tables of allegation and proof in illustration. Sect. 365-371. It is difficult to reconcile some of these holdings. Thus, allegation, "Mr. K.'s wife is a whore," is sustained by proof, "She (Mr. K.'s wife) is a whorish bitch;" *Scott v. McKinnish*, 15 Alabama, 662. On the other hand: allegation, "whore," is not sustained by proof, "strumpet;" *Williams v. Bryant*, 4 Alabama, 44. So allegation, "he stole hogs," is sustained by proof, "he stole a hog;" *Barr v. Gaines*, 3 Dana (Kentucky), 258. On the other hand: allegation, "You swore false," is not sustained by proof, "You have sworn false;" *Sanford v. Gaddis*, 15 Illinois, 228. So, allegation, "riot," is sustained by proof, "riot and assault;" *Hamilton v. Langley*, 1 McMullan (So. Car.), 498. On the other hand: allegation, "thief," is not sustained by proof, "plaintiff had been robbing him;" *Stern v. Lowenthal*, California Sup. Ct., to appear.

The doctrine of variance has lost much of its importance in this country, owing to the large power of amendment and conforming pleadings to proof, under the Code practice.

No. 9. — *J'Anson v. Stuart*, 1 T. R. 748. — Rule.

SECTION V. — *Defence and Justification.*

No. 9. — *J'ANSON v. STUART.*

(K. B. 1787.)

No. 10. — *ZIERENBERG v. LABOUCHERE.*

(C. A. 1893.)

RULE.

A JUSTIFICATION in an action for defamation, which consists of a general charge of dishonesty, must state the particular instances by which the defendant intends to support it. Under the modern system of pleading the plaintiff is entitled to full particulars embodying those matters which formerly must have been contained in the plea to save it from objection on demurrer.

J'Anson v. Stuart.

1 T. R. 748-754 (s. c. 1 R. R. 392).

Defamation. — Libel. — Justification. — Pleading.

[748] To print of any person that he is a swindler is a libel and actionable. A justification of such a charge must state the particular instances of fraud by which the defendant means to support it.

This action was brought in the Common Pleas for a libel printed in the *Morning Post*, which was stated in the declaration with innuendoes, as follows: —

“The public cannot be too frequently cautioned against notorious swindlers and common informers. A nest of these hornets” (meaning the notorious swindlers and common informers), “who live by sucking the honey produced by industrious bees, have lately been discovered dividing the spoil at their nest in the corner of the King’s Road” (meaning the dwelling-house of the plaintiff), “from whence” (meaning the said dwelling-house of the plaintiff) “they” (meaning the said notorious swindlers and common informers) “have heretofore” (meaning before the said time of printing and publishing the said libel) “issued to sting the un-

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suspecting" (meaning to insinuate and be understood thereby that the said plaintiff was illegally, fraudulently, and dishonestly concerned and connected with divers swindlers and common informers, and shared with them the spoil and plunder by them from other persons unlawfully, fraudulently, dishonestly, and by swindling, gotten and obtained). "The head of the gang" (meaning the plaintiff, and * also meaning thereby that the plain- [* 749] tiff was the principal and head of the gang of the said swindlers and common informers) "possesses in a strong degree the attribute of a gentleman, called the Devil, who first seduces, then stimulates, and at last deceives, and leaves his dupes to punishment" (meaning thereby and intending to be thereby understood that the plaintiff was guilty of deceiving and defrauding divers persons, with whom he had dealings and transactions, and that he the plaintiff was not to be trusted). "This diabolical character" (meaning the plaintiff), "like Polyphemus the man-eater, has but one eye, and is well known to all persons acquainted with the name of a certain noble circumnavigator" (meaning by the said last-mentioned words to allude to the name of the plaintiff J'Anson, and meaning thereby and intending that it should be thereby understood that the said false, scandalous, malicious, and libellous words were applicable to, and published of and concerning, the said W. J'Anson).

The defendant pleaded that the plaintiff had been illegally, fraudulently, and dishonestly concerned and connected with, and was one of, a gang of swindlers and common informers, and had also been guilty of deceiving and defrauding divers persons, with whom he had had dealings and transactions, wherefore he printed and published, &c.

To this plea there was a special demurrer, and the following causes were shown; that the defendant hath not set forth or shown in or by his plea in what manner the plaintiff was illegally, fraudulently, and dishonestly concerned and connected with, and was one of, a gang of swindlers and common informers; and also that the defendant hath not thereby shown or disclosed any particular person or persons with whom the plaintiff was so illegally, fraudulently, and dishonestly concerned and connected; and also that the defendant had not shown or disclosed any particular person or persons with whom the plaintiff hath been guilty of deceiving or defrauding, or in what manner, or in what particular

dealings and transactions, he hath so deceived and defrauded any such person or persons; and also that the defendant hath not in or by his plea set forth any day or time when the said several facts alleged by him in that plea against the plaintiff or any of them happened; and also that the defendant has set forth the charges in that plea contained in so general and uncertain a manner, that the plaintiff cannot know what particular facts the defendant will attempt to establish by evidence on the trial of this [* 750] cause in order to support those * charges, and therefore cannot be prepared to disprove or answer the same.

After argument on this demurrer, the Court of Common Pleas, H. 27 G. III. C. B., gave judgment for the defendant. The record was then removed into this Court by a writ of error; and the errors assigned were similar to the causes of demurrer.

Wood, for the plaintiff, insisted that the plea of justification was too general and uncertain, because it did not sufficiently apprise the plaintiff of the defence which was intended to be set up. The defendant ought to have alleged some particular crime, with the time, the place, and the persons with whom the plaintiff was supposed to be connected. A similar justification was attempted to be pleaded in the case of *Newman v. Bailey*, H. 16 G. III. B. R. (2 Chitty, 665). That was an action by a justice of the peace against the defendant, who charged him with "pocketing all the fines and penalties forfeited by delinquents whom he convicted, without distributing them to the poor, or in any other manner accounting for a sum of £50 then in hand." The defendant pleaded that "the plaintiff was a justice of the peace, and that, during the time he acted as such, he convicted divers and sundry persons respectively in divers and sundry fines and sums of money, for and on pretence of their having respectively committed divers respective offences, against the form and effect of divers statutes of this realm; which said respective fines and sums of money, amounting in the whole to £50, he received of the respective delinquents so by him convicted, and had not paid the same to the several persons to whom the same ought to have been paid by virtue of the respective statutes, but had kept and detained the same, contrary, &c." To this there was a special demurrer; and the Court were clearly of opinion that the justification was bad, because it did not specify any one fine or penalty which had been unjustly levied.

Conste for the defendant. The plea may be as general as the

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declaration; and, in the present case, the plea denies the whole charge. This is distinguishable from the case cited; for there was a specific charge that the plaintiff had taken certain fines which belonged to the king, and the justification was general. But here the point in issue was the whole life and character of the plaintiff; therefore it would have been to no purpose for the defendant to have specified any one particular instance, because that would not have been sufficient to prove the charge in the declaration. And if the defendant had set forth many instances, he probably might have failed in the proof of one, and then his * justification could not be supported. And besides, [*751] if it were necessary to specify all the charges, it would be making the record itself a libel. Pleas of justification need not be drawn with more precision and certainty than indictments: And there are several instances where a general charge of this kind is sufficient even in an indictment, such as charges of barratry; or keeping a common bawdy-house. 1 Hawk. P. C., 2 Hawk. P. C. c. 25, s. 59. In 2 Atk. 339, it is said, that in the case of an indictment for keeping a common bawdy-house, without charging any particular fact, though the charge be general, yet at the trial the prosecutor may give in evidence particular facts and the particular time of doing them: the same rule as to keeping a common gaming-house. So a general charge for keeping a disorderly house was held sufficient. 2 Burr. 1232. In the present case, the being a swindler consists in divers acts; and therefore it was sufficient for the defendant to plead the charge generally, and give the particular facts in evidence. But if it be not now too late to take any exception to the declaration, that appears to be informal and insufficient. It charges the defendant with having called the plaintiff a common informer and swindler: Now the former is not actionable, and the latter is not a legal term of which the law can take notice. It is true, indeed, that they are explained by *innuendoes* to mean defrauding and plundering; but the terms themselves are not capable of that explanation: therefore the defendant has a right to throw out the *innuendoes*, and consider the charge itself. And if the matter be not actionable, the manner is not material. *Astley v. Young*, 2 Burr. 811. Besides, the libel is not sufficiently descriptive of the person of the plaintiff.

Wood in reply. The true nature of a plea is to disclose to the plaintiff the particular facts, which are meant to be given in evi-

dence against him; but this plea is so general that the plaintiff cannot be prepared to answer it. As to the charge in the declaration being too general, it is to be observed that it is the charge of the defendant. And if it were not actionable on account of its generality, any person might calumniate another with impunity by generally scandalising his character. This has been compared to an indictment for keeping a common bawdy-house, where it is said that a general allegation is sufficient: but even there the house itself must be specified; the time and the acts done are only the

evidence of keeping an improper house. Suppose the plaintiff [*752] had been indicted for swindling, it * would not have

been sufficient to state, as this plea does, that he had been guilty of defrauding divers persons; but the indictment must have stated whom he had defrauded, and the time when. So an indictment generally for felony is not sufficient; it must allege the particular species of felony. Therefore on the defendant's argument this plea cannot be supported. Then as to the declaration not being sufficient: It is actionable to charge any person with that which may be the subject of an indictment. And there is no doubt, but that if the charge against the plaintiff were true, he might have been indicted for it. And even though certain words, which scandalise the character of another, be not actionable in themselves, yet if they be reduced to writing, they become the subject of a libel. *Austin v. Culpepper*, 2 Show. 313. And the innuendoes are explanations in fact, which are admitted on this record.

ASHHURST, J. This plea is bad on account of its generality. The substance of the libel is that the plaintiff was a common swindler, and that he, in concert with others, defrauded divers persons. One part of the defendant's argument has been that this plea is only as general as the charge in the declaration. But it is to be observed, that it was the charge of the defendant, and the plaintiff was bound to state it as it was made. And it does not follow, that the defendant ought to justify in so general a way. The defendant is *prima facie* to be considered as a wrongdoer. When he took upon himself to justify generally the charge of swindling, he must be prepared with the facts which constitute the charge in order to maintain his plea: Then he ought to state those facts specifically, to give the plaintiff an opportunity of denying them; for the plaintiff cannot come to the trial prepared to

justify his whole life. If the plaintiff had been a common swindler, the defendant ought to have indicted him; but he has no right to libel him in this way. And if the defendant has acted wrong in libelling the plaintiff, he has brought this difficulty upon himself: But where a man stands forth as a public prosecutor, he is entitled to the protection of the public. In some few cases, a general charge in an indictment may be sufficient; but those of barratry and keeping a disorderly house are almost the only instances. The latter case may be supported without mentioning the name of any individual who frequents the house, because it may be notorious to the neighbours that disorderly persons do go there, without their being enabled to specify any particular person. But where a charge of this *kind is preferred, [*753] it must be more particular in order to apprise the other party of it. Now here if the defendant can support his charge that the plaintiff has defrauded divers persons, it must be known to him whom he has defrauded, and he must call them as witnesses to prove the particular acts of fraud: If he cannot substantiate his charge, he ought not to have made it.

BULLER, J. It seems to me that the argument of the defendant's counsel blows hot and cold at the same time. For, first, it is said that the term "Swindler" imports a variety of acts of fraud, and therefore, that they could not be stated in the plea, because it would be multifarious. But the objection afterwards taken to the declaration is that the term "Swindler" is too general, and cannot be legally understood. But Mr. Justice ASTON formerly held otherwise, for he said that the word "Swindler" was in general use, and that the Court could not say, they were ignorant of it. But at all events, we cannot say on this record that we do not understand the import of it, for it is explained to be "defrauding divers persons." The first question then here is, Whether the defendant is at liberty to charge the plaintiff with swindling, without showing any instances of it? That is contrary to every rule of pleading; for wherever one person charges another with fraud, he must know the particular instances on which his charge is founded, and therefore ought to disclose them. The rule in pleading is this, that wherever a subject comprehends multiplicity of matters, to avoid prolixity, generality of pleading is allowed; as a bond to return all writs, &c. But if there be any thing specific in the subject, though consisting of a number of acts, they

must be all enumerated; as on a covenant "to infeoff of all his lands," the covenantor in showing performance must state them all; so if a person be bound "to pay all the legacies in the will," he must specify them all, and aver payment of each; and the reason is, because all these facts lie within the knowledge of the party, Cro. El. 749. Now in the present case, if this plea were to be suffered, it would be to allow any person to libel another more on the records of the Court than he could do in a public newspaper. If the plaintiff has been guilty of any acts of swindling, the defendant must be taken to know them. He could not prove the justification, as he has pleaded it, by general evidence; but he has no justification, unless he can prove the special instances; and, knowing them, he ought to put them on the record that the plaintiff might be prepared to answer them. It has [* 754] *been said, that this case is different from that of *Newman v. Bailey*, because that was a specific charge. But that is not so: for there the plaintiff was charged with pocketing all the fines, &c., which was as general as possible. And there the Court said it was necessary to specify the particular acts. The cases of indictments, which were cited, do not apply here. As to that of barratry, it has always been stated as an exception to the general rule: I have not been able to discover how that exception was first established; but it is of ancient date. But in that case something more is required than is stated in the present case; for though the indictment is good in a general form, yet it has always been held that the prosecutor must give the defendant notice before the trial of the particular instances that are meant to be proved, so that even there the inconvenience of allowing a general charge is guarded against. With respect to the case of an indictment for keeping a common bawdy-house; there more certainty in the indictment is required than is stated here; for it must state the place where the house is situate and the time; the crime therefore is particularly stated in that case, for the offence is the keeping of the house: And it is not necessary to prove who frequents the house, for that may be impossible; but if any unknown persons are proved to be there behaving disorderly, it is sufficient to support the indictment. So in the case of a common scold, it is not necessary to prove the particular expressions used, it is sufficient to prove generally that she is always scolding. Therefore in all these instances, the party is sufficiently apprised

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of the nature of the charge which is intended to be proved against him. It is not true, as was contended, that the general character of the plaintiff is put in issue; for the evidence to support the defendant's plea must be special. Where it is permitted to the party to give general evidence of character, as in the case of a prisoner, he cannot enter into particular instances; but where, as in the present case, the whole defence arises from the proof of particular facts, the general character is not in issue. Then as to the declaration itself, it contains as libellous a charge as can well be imagined.

GROSE, J., declined giving any opinion, as he had argued this case at the bar in the Court of Common Pleas.

Judgment reversed.

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1893, 2 Q. B. 183-191 (s. c. 63 L. J. Q. B. 89; 69 L. T. 183; 41 W. R. 675).

Libel. — Justification. — Particulars.

In an action of libel, where the charge made against the plaintiff in the [183] alleged libel is general in its nature, a defendant who pleads a justification must state in his particulars the facts on which he relies in support of his justification.

Appeal from a judgment of the Divisional Court, affirming an order of a Judge at chambers for further and better particulars.

The action was brought in respect of an alleged libel published in a newspaper of which the defendant was proprietor. The general effect of the alleged libel was to bring a charge against the plaintiffs, who were husband and wife, that, under pretence of carrying on a home for inebriates, they obtained money from charitable persons to be devoted to that purpose, and retained it for their own use. The article averred that the plaintiffs were "charity swindlers" and "impostors," and that the home was "a monstrous swindle." There were other allegations reflecting on the conduct and character of the plaintiffs to which it is not necessary further to refer, as the sufficiency of the particulars as to these matters was not in question. The defendant pleaded a justification in general terms that the statements complained of were true. An order was thereupon obtained for the delivery of particulars covering all the statements of the alleged libel, and among other things requiring particulars "of how and in what way the

plaintiffs were 'charity swindlers' and 'impostors,' and the home was a 'monstrous swindle,' and of the facts and matters relied on in support of such allegations, and when they occurred." To this the defendant replied: "The plaintiffs by the annual reports, prospectuses, and appeals issued by them to the subscribers and the public represented the St. James' Home as a home for female inebriates, and invited subscriptions and donations for the home, on the ground that it was a home for female inebriates, [* 184] and such subscriptions and donations as were *paid were paid upon the faith of that representation and invitation, whereas in fact the home was conducted and managed as a commercial undertaking, and in such a way as to further the success of the undertaking rather than the welfare of its inmates, and so that the plaintiffs could benefit themselves by the carrying on of the home. The facts and matters relied on are all the facts and matters stated in the alleged libel (within certain specified limits), and in addition the following facts and matters, viz.: that no proper system of books or accounts showing the receipts and expenditure of the home was kept, and that no proper vouchers were submitted to the auditors for the purpose of preparing the annual balance sheets, and that the balance sheets do not show the real or entire receipts or expenditure of the home, and that the plaintiffs by means of the home were enabled to live free of expense to themselves, and that they appropriated for their own purposes monies received for or earned by the home, and they caused statements to appear in the annual balance sheets of the home, of cash supplied by the female plaintiff and loans made by the male plaintiff, which were not in fact supplied or lent out of their own monies, but in reality out of the monies of the home, and the time when the aforesaid facts and matters occurred was the whole time the home has been open since its institution in 1876." After delivery of these particulars a master, on the application of the plaintiffs, made an order for further particulars, setting out, among other things, "the receipt of monies appropriated by the plaintiffs for their own purposes, and not accounted for, and of the persons from whom and the dates when such monies were received, and in what way the expenditure of the home was not shown by the balance sheets," and that the defendant should be precluded from giving any evidence in support of his justification in respect of the matters as to which he

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did not give the particulars ordered. This order was confirmed by the judge at chambers and the Divisional Court.

The defendant appealed.

1893. May 30. R. T. Reid, Q.C., and J. Eldon Banks, for the defendant. The defendant is not bound to give further *particulars, or, at all events, is not bound to give [*185] them with the minuteness asked for. His justification is general and depends on the general conduct of the plaintiffs in managing the home and not on the misappropriation of any particular subscriptions. The answers sufficiently indicate the nature of the evidence which the defendant will bring forward, and he ought not to be called on to disclose the names of his witnesses. At all events, he ought to have discovery before being required to give further answers. *Leitch v. Abbott*, 31 Ch. D. 374, 55 L. J. Ch. 460.

[They also cited *Hickinbotham v. Leach*, 10 M. & W. 361, 11 L. J. Ex. 341, and *Gourley v. Plimsoll*, L. R., 8 C. P. 362; 42 L. J. C. P. 244.]

Sir E. Clarke, Q.C. (C. C. Scott, with him), for the plaintiffs, was stopped. [He cited *J. Anson v. Stuart*, p. 98, *ante*, 1 T. R. 748 (1 R. R. 392).] J. Eldon Banks, replied.

Cur. adv. vult.

1893. June 1. Lord ESHER, M.R. In this case the plaintiffs have brought their action charging that the defendant has libelled them, and they have set out in the statement of claim that which they say is the libel. The matter so set out contains a great many separate statements said to be libellous; but the defendant does not confine his plea to any particular part, but, as he has a right to do, pleads generally to the whole a justification that it is true. The plaintiffs say that the defendant pleading a justification in libel must give particulars, and have taken out a summons for particulars, not asking for them in general terms but, according to the usual practice, pointing out the matters as to which particulars are required. The defendant has given particulars, and, as to some of them, the plaintiffs are satisfied of their sufficiency, but as to other matters they say that no particulars have, in fact, been given, or that the particulars are in general terms and insufficient, and ought to be supplemented by further particulars giving more specific information. The defendant objects to giving any further particulars, and what we have to decide is whether he is bound to give them or not. The defendant raises the question in this way:

[* 186] He says he ought not *to be obliged to give any further particulars; but he says further that the questions put to him are too minute, and he raises this further point that if he is to answer those questions he ought not to be obliged to do so at the present time, but ought to be allowed discovery by means of interrogatories, and inspection of books, before he is called on to do so.

Strictly speaking, the defendant, having pleaded generally a justification of the whole libel, would be bound to prove the whole to be true, and if he failed in doing so, it might be said that his plea of justification failed altogether. That would have been the old practice; but that seems to be too strict a view of the rights of the parties to take at the present time, and I think we ought to treat the case as if the statements in the claim were statements of separate libels and the general plea of justification as if it applied to each part of the claim.

That a general plea of justification of a libel without particulars of that justification is bad has been the law from the earliest times. This is illustrated by the judgments of ASHHURST and BULLER, JJ., in *J. Anson v. Stuart*. The former says in giving judgment: "When he" — that is, the defendant — "took upon himself to justify generally the charge of swindling, he must be prepared with the facts which constitute the charge in order to maintain his plea: Then he ought to state those facts specifically, to give the plaintiff an opportunity of denying them; for the plaintiff cannot come to the trial prepared to justify his whole life." That is a leading case on the subject, and at the time when it was decided it was necessary to put the particulars in the plea. Afterwards the practice was varied, and a defendant could make his plea general; but he was still bound before he went to trial to give as particulars the same matters that he would formerly have been bound to put in his plea. The mode of dealing with such a case as this is stated by PARKE, B., in *Hickinbotham v. Leach*, 10 M. & W. 361, at p. 363: "It is a perfectly well-established rule in cases of libel or slander, that where the charge is general in its nature, the defendant, in a plea of justification, must state some specific instances of the misconduct imputed to the plaintiff." And in that case, during the argument, [* 187] ALDERSON, B., at page 363, *said: "The plea ought to state the charge with the same precision as in an indictment." That, I think, must now be read in this way: "If the

instances are not put into the plea the particulars must be as precise as would be necessary in an indictment." Treating the case then by way of indulgence to the defendant, as though he had picked out this particular libel with which we are now dealing, and stated that it was true, we must consider whether he has given particulars which are sufficient. The libel is in effect that the plaintiffs are "charity swindlers and impostors and the home is a monstrous swindle." That is a general statement, and he is asked for particulars, that is, for the instances on which he relies to justify that statement, and he says: "The instances are that they appropriated for their own purposes monies received for, or earned by, the home, and they caused statements to appear in the annual balance-sheets of the home of cash supplies by the female plaintiff, and loans made by the male plaintiff, which were not, in fact, supplied or lent out of their own monies, but in reality out of the monies of the home." Is that answer sufficient? No doubt it states the way in which the defendant means to justify; but it is almost as general as the statement in the alleged libel. It does not give the instances, nor does it state the times or occasions on which the swindles are alleged to have been done, nor does it give the names of the persons whose money is alleged to have been misappropriated. In old days a plea that did not give such particulars of justification would have been bad, and at the present time particulars that fail in this respect are insufficient. Therefore, being of opinion that these statements in the particulars are not sufficiently precise as to the instances on which the defendant means to rely, we must agree with the Divisional Court that the defendant must give further particulars, and if he does not, his justification as to that part of the libel must fail, and he will not be allowed to go into it.

The defendant, however, alleges that the particulars asked for are too minute, and would hamper him in his defence, — that is to say, that he ought not to be called on to give names because he would be giving the names of his witnesses. If the particulars are those that he ought to give, he cannot refuse to *do so merely on the ground that his answer will disclose [*188] the names of the witnesses he proposes to call. On this point all that we say is, that the plaintiffs are within their rights in asking for these particulars, but whether the defendant can in his answer give any reasonable excuse for not answering as to some of the matters raised is a question we do not go into.

I now come to the contention that the defendant ought not to be made to answer now, but should be allowed discovery by way of interrogatories and inspection before being called on to do so. This is not a case in which, before the action was brought, there was any relation between the parties, such for instance as that of principal and agent which would entitle the defendant to discovery. The only connection between them is that of plaintiff's and defendant in an action for libel, and the defendant is not entitled to discovery for the purpose of finding out whether he has a defence or not. Such discovery has never been allowed in the absence of some relationship between the parties to the action, except under exceptional circumstances, such as one party keeping back something which the other was entitled to know. Here the justification, for want of sufficient particulars, is not a well-pleaded defence, and till there is such a defence there can be no right to discovery, in the absence both of the relationship of which I have spoken and of any special circumstances. The pleading by the defendant of his justification, which consists of his general plea and his particulars, is not yet a well-pleaded defence, and until there is such a defence the defendant has no right to discovery.

Upon principle and authority the defendant's contention that he is not bound to give the particulars till he has had discovery fails. A case was cited, *Leitch v. Abbott*, 31 Ch. D. 374, that was said to show the contrary and to prove that there was now a new state of the law, the result of the Judicature Acts, but in that case there existed a relationship between the parties which gave a right to discovery before plea, and the decision was founded on the existence of that relationship, so that the case is no authority for the contention of the defendant. The decision of the Divisional Court will therefore be affirmed.

[* 189] * BOWEN, L.J. I am entirely of the same opinion.

The following judgment was read by

KAY, L.J. The argument in this case, in one view of it, seems to involve the question whether mere suspicion can justify a libel. It is urged that the so-called particulars, which are in terms as general as the libel complained of, ought not to be made more definite at present, because until the defendant has obtained discovery from the plaintiff, he may not be able to give particulars in any better form. The defendant in a libel action may plead a

justification. But it is no justification to plead simply that the alleged libel is true. That, as has been pointedly said, is not justification but is merely repeating the libel. *J. Anson v. Stuart*, p. 98, *ante*, 1 T. R. 748 (1 R. R. 392). Accordingly the practice required that the plea should state facts which justified the defendant in publishing the language complained of. This is clear from the decision in *Hickinbotham v. Leach*, 10 M. & W. 361, and the authorities referred to in that case: *Jones v. Stevens*, 11 Price, 235; *Newman v. Bailey*, 2 Chit. Rep. 665; *J. Anson v. Stuart*, *Holmes v. Catesby*, 1 Taunt. 543.

It is said that the modern practice is not to state the facts relied on as a justification in the pleading, but to add them in particulars. I presume this is done under Order XIX., rr. 6, 7. But then the particulars should be as explicit as the plea was required to be before.

If the defendant says that he is unable to state any such facts without discovery, the answer is simple and conclusive, — he ought not to have published the libel, and cannot plead any justification for having done so.

The case of a charge of fraud against an agent, or a breach of trust against a trustee, by pleading only, where no libel has been published otherwise, is essentially different. There the fiduciary relation, and the circumstance that the facts are generally known only to the defendant, or at least that he has means of knowledge not in the first instance equally accessible to the plaintiff, may justify the Court in requiring the defendant * to [*190] make discovery before the plaintiff is called on to give particulars, because the fiduciary relation of the defendant to the plaintiff entitles the plaintiff to all the knowledge which the defendant may have, and it is not uncommon, when a conflict arises between the right of the plaintiff to discovery and the right of the defendant to particulars, in such cases to postpone the giving of particulars until the discovery has been made. *Leitch v. Abbott*; *Suchs v. Spielman*, 37 Ch. D. 295.

But to apply this practice to the case of libel would be to sanction the publication of a libel when the libeller knew no facts justifying the libellous statement, because he believed he could by the process of discovery elicit such facts.

It is urged that if the facts are stated before discovery is given that the discovery will be limited to the particular facts so alleged.

I am not satisfied that this will necessarily be so. I can conceive a case in which a libel in general terms may be justified by certain facts stated in the particulars, and that there may be power to obtain discovery of other analogous facts which may support the justification. But even if it were so limited, that is no reason why the particulars should not be as definite or explicit as the defendant can make them. It seems to me a much less evil, if it be an evil, to confine the discovery to the particular facts adduced as a justification, than to give the smallest sanction to a libel unsupported by facts which justify the publication.

There is another obvious reason for requiring precise particulars, namely, that the plaintiff may know the case he has to meet and what acts it is alleged have been committed which justify the general charge against him. But this is a consideration not peculiar to libel cases.

I am of opinion that the particulars complained of are too general; that they are not particulars at all, but a mere repetition of part of the libel, and that further and better particulars ought to be given.

There remains the question whether the penalty if better particulars are not given is not as it now stands too large. A libel-

lous statement as to which no particulars are given ought [* 191] *not to be allowed to be justified at all. But where some

facts are stated in the particulars by way of justification which may or not be sufficient, it is argued that the defendant should not be prevented from relying on them at the trial simply because he has added a general statement which in itself is not sufficient. However, I am not satisfied that this argument applies in the present case. I do not think that any facts are stated as a justification in this case in the particulars complained of, and, therefore, the penalty imposed is not too large.

Appeal dismissed.

ENGLISH NOTES.

The plea of justification on the ground of truth is that the whole statement is substantially true. If the whole statement is not true, the plea fails. For instance, if the heading or title of a paragraph in a newspaper is not true, the fact that the paragraph itself is true or privileged will not save the paper from liability. In *Clement v. Lewis* (1822), 3 Brod. & Bing. 7 Moo. 200, 3 B. & Ald.

702, 22 R. R. 530, the heading of a paragraph was "Shameful conduct of an attorney." The paragraph itself consisted of a correct report of certain proceedings in the Insolvent Debtors' Court. The plaintiff was held entitled to judgment, on the ground that the heading formed no part of the proceedings. In *Mountjoy v. Watton* (1831), 2 B. & Ad. 673, the defendant published in a newspaper a paragraph entitled "Horse Stealer." This was followed by a correct statement of the circumstances under which the plaintiff was taken up on suspicion of stealing a horse. The defendant justified everything except the word "horse stealer." The plea of justification failed. In *Bishop v. Latimer* (1861), 4 L. T. 775, the title of a paragraph in a newspaper was "How lawyer B. treats his clients." The paragraph reported a case in which one client of B. had been badly treated. It was decided that the heading was untrue and the plea of justification failed.

So, gross exaggeration destroys the plea of justification. In *Clarkson v. Lawson* (1829-30), 6 Bing. 266, 4 M. & P. 356, the defendant wrote of the plaintiff, a proctor, that he had been three times suspended for extortion. In fact, he had only once been suspended for extortion. The defendant was held liable.

In *Wokley v. Cooke & Healy* (1849), 4 Ex. 511, 19 L. J. Ex. 91, the defendant called the plaintiff a libellous journalist. The plaintiff had libelled only one person. He was allowed to recover damages from the defendant. In *Legman v. Latimer* (1877-78), 3 Ex. D. 15, 352, 47 L. J. Ex. 470, 37 L. T. 819, 26 W. R. 305, the defendant accused the plaintiff of being a convicted felon. The plaintiff was in fact an ex-convict. It was held that the word "felon" was not justified.

In *Watkin v. Hall* (1868), L. R., 3 Q. B. 396, 37 L. J. Q. B. 125, 18 L. T. 561, 16 W. R. 857, 9 B. & S. 279, the defendant was held not justified in repeating a Stock Exchange rumour concerning the solvency of the plaintiff. Nor is the existence of a rumour to the same effect as the libel admissible as evidence on a plea of justification. *Scott v. Sampson* (1882), 8 Q. B. D. 491, 51 L. J. Q. B. 380, 46 L. T. 412, 30 W. R. 541.

The defendant set out counsel's opening speech in a case, and stated that the facts opened were proved. The plea of justification was that a witness had been called, who by his testimony proved all that had been stated by counsel. The plea was held bad on demurrer, for not showing the truth of the facts in detail. *Lewis v. Walter* (1821), 4 B. & Ald. 605, 23 R. R. 415.

Where the declaration sets out an alleged libel consisting of two statements which are separable, one of which is libellous and the other (not libellous in itself) is not accompanied by any *innuendo* suggesting a libellous meaning, it is sufficient for the defendant to justify the libellous matter. So in *Clarke v. Taylor* (1836), 2

Bing. N. C. 654, the defendants justified and proved the truth of a libel charging the plaintiff with having acted in a grand swindling concern at Manchester; but omitted justification of the following passages in the publication alleged to be a libel: "As we have already stated Clarke had been at Leeds and is supposed to have made considerable purchases there. We have already stated that Clarke referred Mr. A. to a stockbroker in London, a Mr. Peacock we believe, to whom Mr. A. wrote for information respecting Clarke's circumstances. He received a reply from Mr. Peacock, stating that Clarke had been introduced to him by a very respectable party; that he had sold stock for Clarke. . . . We believe there is not the slightest reason to doubt the truth of Mr. Peacock's statement; and the probability is that Clarke had been furnished with the stock, and an introduction had been obtained to the stockbroker for the purpose of giving colour to his proceedings here and in Yorkshire." The jury having found for the defendant on the part of the libel which was justified, the Court refused to enter a verdict for the plaintiff on the passage above quoted. TINDAL, C. J., said (2 Bing. N. C. p. 664) "There can be no doubt that a defendant may justify part only of a libel containing several distinct charges. This was established in *Stiles v. Nokes*, 7 East, 493, where LAWRENCE, J., said: 'A plea of justification may be good with a general reference to certain parts of the libel set forth in the declaration, if the Court can see with certainty what parts are referred to, as if the reference be to so much of the libel as imputes to the plaintiff such a crime (*e. g.*, perjury) that would be sufficient without repeating all those parts again, which would lead to prolixity of pleading, and ought to be avoided.' But if he omits to justify a part which contains libellous matter, he is liable in damages for that which he has omitted to justify. The plea in the present instance does not affect to justify the whole of the publication, and we are to see whether the part omitted would by itself form a substantive ground for an action of libel. I cannot say that it is of that description. . . . The declaration contains no allegation that fraud was imputed to the plaintiff in his transactions at Leeds. . . . As the plaintiff himself has not fixed a bad sense on it (the passage above quoted), I cannot see why we should do so."

Provided the whole statement is substantially true, general expressions of invective founded on the facts need not be particularly justified, if such expressions would not produce a different effect on the mind from that which the actual truth would produce. In *Morrison v. Harmer* (1837), 3 Bing. N. C. 759, the defendant wrote of the plaintiffs that they pretended to cure all sorts of diseases with one kind of pill, that they were scamps and rotgut rascals, and that their system was one of wholesale poisoning, and that they had been convicted of man-

slaughter, fined, and imprisoned for causing deaths by the administration of their poisonous vegetable boluses. It was proved that the pills if taken in large quantities as recommended in the advertisements and by the plaintiff's agents were poisonous; that the pills so taken had caused the death of two persons, and that the plaintiffs had been convicted of manslaughter for causing these deaths. It was held that absence of further proof as to truth of the general expressions of invective did not destroy the plea of justification.

In *Reg. v. Labouchere (Lambert's Case)* (1880), 14 Cox, C. C. 419, the defendant wrote of the prosecutors that "A., B., & C. are a gang of cardsharps." It was proved that they had on two occasions cheated at cards. The defendant was discharged, it being held that the plea of justification was proved.

AMERICAN NOTES.

Mr. Newell cites the first principal case, with approval (*Defamation*, p. 652), saying: "A justification must always be specially pleaded, and with sufficient particularity to enable plaintiff to know precisely what is the charge he will have to meet." Citing *Johnson v. Stebbins*, 5 Indiana, 364; *Jaycocks v. Ayres*, 7 Howard Practice (New York), 215; *Jones v. Cecil*, 5 English (Arkansas), 593; *Van Ness v. Hamilton*, 19 Johnson (New York), 349; *Torrey v. Field*, 10 Vermont, 353, citing *J'Anson v. Stuart*; *Stow v. Converse*, 4 Connecticut, 17; *Cooper v. Greeley*, 1 Denio (New York), 361, citing *J'Anson v. Stuart*.

In *Van Ness v. Hamilton*, *supra*, where the defendant by plea charged a member of the council of revision with taking money for procuring a charter, it was held that the particular facts must be alleged. Chief Justice SPENCER said: "A plea in bar of the plaintiff's action must be certain to a common intent; it must be direct and positive in the facts set forth, and must state them with all necessary certainty." Citing *J'Anson v. Stuart*, at length, and observing: "No case falling under my observation impugning the doctrine there laid down. . . . A material and traversable fact must be expressly stated." The contrary would be "an alarming doctrine."

Mr. Townshend cites the first principal case very frequently, observing (*Slander and Libel*, sect. 357): "The facts which show the cause to be true must be stated with certainty, so that the Court can see whether the defendant was justified in what he published." Citing *Kerr v. Force*, 3 Cranch (U. S. Cir. Ct.), 8; *Fry v. Bennett*, 5 Sandford (New York Superior Ct.), 54; *Maretzek v. Cawdwell*, 2 Robertson (*ibid.*), 715; *Wachter v. Quinzer*, 29 New York, 552. "Where the charge is in general terms, the answer must state the facts which show the charge to be true. It is not sufficient merely to allege that the charge is true." Townshend on *Slander and Libel*, sect. 355; *Lawton v. Hunt*, 4 Richardson Law (So. Car.), 258; *Atteberry v. Powell*, 29 Missouri, 429; *Barrows v. Carpenter*, 1 Clifford (U. S. Circ. Ct.), 204; *Cook v. Tribune Ass'n*, 5 Blatchford (*ibid.*), 352; *Sweeney v. Baker*, 13 West Virginia, 158.

Under the Code Practice in this country either party is entitled to a bill

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of particulars of any charge not set forth with sufficient detail in the pleading to enable the party to meet it.

The point is fully and learnedly examined, with citations of many English authorities, in *Tilton v. Beecher*, 59 New York, 176; 17 Am. Rep. 337, in which particulars of the plaintiff's charges in an action of *crim. con.* were ordered. (Two Judges dissented.)

This doctrine was applied by Chief Justice SHAW to a case of criminal libel, in *Commonwealth v. Snelling*, 15 Pickering (Mass.), 321 (see *McDonald v. People*, 126 Illinois, 150; 9 Am. St. Rep. 547; *Williams v. Commonwealth*, 91 Pennsylvania State, 493); and the same Court applied it to a declaration in a civil suit for slander, in *Clark v. Munsell*, 6 Metcalf (Mass.), 373; and so in *True v. Plumley*, 36 Maine, 466; *McLean v. Warring* (Mississippi), 13 Southern Repr. 236; *Childs v. Tuttle*, 48 Hun (N. Y. Sup. Ct.), 228; *Madden v. Underwriting, &c. Co.*, 10 Miscellaneous (N. Y.), 27.

See Newell on Defamation, p. 745. Mr. Townshend says (Slander and Libel, sect. 275), "It is almost a matter of course" to order a bill of particulars to supplement a complaint which does not give particulars of times, places, and persons.

But it has been held in New York that the proper practice to obtain particulars of a justification is by motion to make the answer more definite. *Orcis v. Dana*, 1 Abbott New Cases (New York), 268. The Court said: "There is no precedent in this State for a bill of particulars in a libel suit," but concluded that the Court had *power* to order particulars to be furnished by a defendant as well as a plaintiff in such a suit. But further they held that "if the defendant fails to plead a complete justification, he will not be permitted to prove his defence. The plaintiff has his election either to move to make the answer more definite and certain, or to lie by, and object on the trial to the reception of any evidence offered to support the defective plea." This case contains an interesting review of the English authorities on the point.

SECTION VI. — *Province of Judge and Jury.*No 11. — *BLAGG v. STURT.*

(Q. B. 1846.)

STURT v. BLAGG.

(EX. CH. IN ERROR. 1847.)

RULE.

IT is the province of the judge to decide whether a publication is capable of the meaning ascribed to it by an innuendo, and for the jury to decide whether such meaning is truly ascribed to it.

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10 Q. B. (Ad. & El.) 899-908 (s. c. 16 L. J. Q. B. 39; 11 Jur. 1011).

Libel. — Innuendo. — Province of Judge and Jury.

Held by the Court of Exchequer Chamber, affirming the judgment of [899] the Queen's Bench, that it is for the judge to decide whether a publication is capable of the meaning ascribed to it by an innuendo, and for the jury to decide whether such meaning is truly ascribed to it.

Where a declaration for libel stated that plaintiff was town-clerk and clerk to the justices of a borough, that two persons were apprehended on a charge of embezzlement, and that defendant sent a letter to the Home Secretary, stating that the administration of justice ought to be above suspicion, that one of the above persons, who was taken before justices out of the borough, was defended by plaintiff, that the other, who was taken before the borough justices, was defended by a friend of plaintiff, he himself acting as legal adviser to the justices, that the closest intimacy had long existed between plaintiff and the prisoners, and that among the papers of one of them was found an enormous amount of accommodation bill transactions, plaintiff, and others with whom he is associated, being the parties thereto, thus clearing up the mystery as to the uses to which the plunder had been appropriated; that defendant deemed this a state of things demanding a remedy, and called upon the Secretary to take such steps as the justice of the case and the crying evil demanded. "meaning thereby that the plaintiff had conspired with and was an accomplice" of the prisoners in the embezzlement, and also that, as clerk and legal adviser of the borough justices, he had acted corruptly at the examination before them: *Held*, by the Court of Queen's Bench, and by the Exchequer Chamber, affirming their judgment, that the letter was capable of the meaning ascribed to it by the innuendo.

Held, also, by the Court of Exchequer Chamber, that a libel sufficiently appeared on the declaration, without the innuendo.

Case. The declaration alleged that plaintiff, before and at the time of the committing, &c., carried on the business and profession of an attorney at law, and also the business, &c., of a solicitor of the Court of Chancery, at St. Alban's, in Hertfordshire, and was acquiring great gains, &c.: allegation of good character: and also plaintiff, before and at the time of the committing, &c., held and enjoyed the office of town clerk of the borough of St. Alban's, and also the office of clerk to the justices of the peace of the said borough, the jurisdiction of which said justices is distinct from and independent of and unconnected with the jurisdiction of the justices of the peace of the liberty of St. Alban's in the county of * Hertford: allegation of faithful discharge [* 900]

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of the duties of the said offices, and of plaintiff's good repute with the justices of the borough: That, before and at the time of the committing, &c., to wit, 16th April, 1846, one Richard Charles Gutteridge, who before then had been in the employ of one Thomas Kinder, a brewer at St. Alban's, was apprehended upon certain charges of felony; that is to say, for that he, the said R. C. G., being clerk and servant to the said T. K., did, by virtue of such his employment, whilst he was such clerk, &c., receive and take into his possession divers moneys for and in the name and on the account of the said T. K., his master, and did fraudulently and feloniously embezzle the same: That R. C. G., on, &c., was brought before the justices of the peace of the said liberty to be examined by them, and was then and afterwards, to wit, 21st April, in the year aforesaid, examined by them concerning the said charges; at which said examinations plaintiff acted as, and was, at the request of the said R. C. G., the legal adviser and attorney at law of the said R. C. G.: And also that, before and at the time of the committing, &c., to wit, 18th April, 1846, a certain other person, viz., one David Hutson, who before then had been in the employ of the said T. K., was taken into custody and apprehended upon a certain other charge of felony, that is to say, for that he, the said D. H., being clerk and servant to the said T. K., did, by virtue of such his employment, whilst he was such clerk and servant, receive and take into his possession divers moneys for and in the name and on the account of the said T. K., his master, and did fraudulently and feloniously embezzle the same: and the said D. H., on the day and year last aforesaid,

was brought before the justices of the said borough, to [* 901] *be examined by them, and was then, and afterwards, to

wit, on, &c., examined by them concerning the said last mentioned charge: at which said examinations of the said D. H. plaintiff acted and was the legal adviser of the said justices. Yet defendant, well knowing, &c., but contriving, &c., to injure plaintiff in his said good name, &c., and to bring him into public scandal, &c., and to injure plaintiff in his said businesses and professions, and in his said offices of town clerk and clerk, &c., to the justices aforesaid, and to cause it to be suspected, &c., that plaintiff had acted improperly and dishonestly in his said professions and businesses, and in his said offices of town clerk and clerk and legal adviser to the justices of the borough, heretofore,

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to wit, on 23d April, 1846, in the form of a letter addressed To the Right Honourable Sir James Graham, Secretary of State, Home Office, meaning thereby the Right Honourable Sir James Robert George Graham, Baronet, one of the principal Secretaries of State of our Lady the now Queen, falsely and maliciously did compose and publish, and cause and procure to be published, of and concerning plaintiff, and of and concerning the said examinations of the said R. C. G. and D. H. respectively, and of and concerning the conduct of plaintiff in his said offices of town clerk and clerk and legal adviser as aforesaid, and in his said businesses and professions and of and concerning the conduct of plaintiff at the said examinations, a certain false, &c., libel, containing, amongst other things, the false, &c., and libellous matter following, of and concerning plaintiff, and of and concerning the said examinations and the conduct of the plaintiff as aforesaid; (that is to say): —

“Honourable Sir (meaning,” &c.), “Deeming the due *administration of justice of paramount importance, and [*902] that those who administer it should be not only pure but above suspicion, I (meaning,” &c.) “beg to call your attention to the following facts, showing the anomalous position of a certain functionary (meaning the plaintiff) in this borough (meaning the said borough of St. Alban’s). At this time there are two persons fully committed for trial for felony, one (meaning the said R. C. G.) by the liberty magistrates, and one (meaning the said D. H.) by the borough magistrates. The parties (meaning the said D. H. and R. C. G.) are related, being uncle and nephew, and lately clerks to a brewer (meaning the said Mr. T. K.), whom they are charged with having robbed for a series of years. The nephew (meaning the said R. C. G.) was taken into custody first; and he was committed by the liberty magistrates, and is now in our gaol, bail having been refused. This prisoner (meaning the said R. C. G.) is defended by the town clerk of this borough (meaning the plaintiff). The uncle (meaning the said D. H.) was committed by the borough magistrates, the town clerk (meaning the plaintiff) taking the evidence, and acting as legal adviser to the magistrates; a friend of his acting as legal adviser to the prisoner. The most close intimacy has existed for years between the town clerk (meaning the plaintiff) and the two prisoners (meaning the said R. C. G. and D. H.): and, when the nephew’s (meaning the

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said R. C. G.'s) papers were yesterday examined, an enormous amount of accommodation bill transactions, and legal proceedings arising therefrom, amounting to many thousands, were discovered; the said town clerk (meaning the plaintiff), and others with whom he (meaning the said plaintiff) is closely associated, being the parties *thereto, thus clearing up the mystery as to the uses to which the plunder had been appropriated. Deeming this a state of things demanding a remedy, I (meaning, " &c.") "respectfully call your prompt attention to the same, feeling assured that you will institute the necessary inquiry, and take such steps as the justice of the case and the crying evil pointed out demand (meaning thereby that the plaintiff had conspired with, and was an accomplice of, the said R. C. G. and D. H. in embezzling the moneys of the said T. K., and had made use of the proceeds of the said embezzlement, and also that the plaintiff, as such clerk and legal adviser as aforesaid, had acted corruptly and dishonestly in his said office and employment at the said examinations of the said D. H. before the said justices of the said borough, in order that the said justices might be induced to dismiss the said charge against the said D. H., and to discharge him out of custody). By means," &c., "(General allegation of damage to character, &c.)"

Pleas: 1. Not guilty. Issue thereon. 2, 3 and 4. Pleas in justification. Replication to each, *De injuria*. Issue thereon.

On the trial, before PARKE, B., at the Hertfordshire Summer assizes, 1846, the plaintiff proved that the defendant had written and sent the letter, mentioned in the declaration, to Sir James Graham, who was then Secretary of State for the Home Department, and who had thereupon instituted an inquiry under the superintendence of Mr. F. N. Rogers, the Deputy Judge Advocate, who had not yet reported the result. The plaintiff also gave evidence to show that the charges in the libel were, in part, false; and also that the defendant, who was an inhabitant of the [* 904] borough of St. Albans, had said *that he should feel great pleasure in ridding the borough of men like the plaintiff. The counsel for the defendant contended that the letter was a privileged communication, and that express malice could not be proved by evidence of falsehood. The learned Judge gave leave to move for a nonsuit: and he left to the jury whether they believed the innuendo as to the meaning of the letter; and, if they did,

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whether the defendant had sent the letter merely with the honest purpose of aiding in the administration of justice, or from a malicious motive and with a knowledge that the charge was false. No evidence was offered in support of the pleas in justification. Verdict for plaintiff on all the issues.

M. Chambers, in Michaelmas term, 1846,¹ moved for a nonsuit, or a new trial, or to arrest the judgment. The Secretary of State has the superintendence of the functionaries who take part in the administration of justice; and any person is entitled and bound to bring before him cases of maladministration in an office connected therewith, especially if such person be, as here, an inhabitant of the place in which the office is exercised. The communication itself may be said, from its very nature, to be confidential. The falsehood of the charge does not destroy the protection which the privilege confers. *Lake v. King*, 1 Saund. 131, 132, *Rev v. Baillie*, 21 How. St. Tr. 1, 71. Even if there be an exception to this rule, in the case of a malicious motive, there was in the present case no evidence of malice for the jury. The application to the Home Secretary was regularly made, with a view to an inquiry,

* which had accordingly been instituted. It is true that, [* 905] in *Robinson v. May*, 2 Smith, 3 (7 R. R. 774), it was held that, where there was an "absence of all ground for the representation," that was proof of malice: but here only a part of the charge was shown to be false. Further, the publication itself is not such as to justify the innuendo, which attempts to extend the meaning. It was therefore not competent to the jury to affirm the innuendo; and the judgment must be arrested. *Solomon v. Lawson*, 8 Q. B. 823. See *Le Fanu v. Malcomson*, 1 H. L. Ca. 637; *Gutsole v. Mathers*, 1 M. & W. 495, Tyrwh. & Gr. 694.

Cur. adv. vult.

Lord DENMAN, C. J., in the same term (November 16th), delivered the judgment of the Court.

We are of opinion that the defendant was not exempt from responsibility for that which would otherwise be a libel, by reason of its being an application to a competent tribunal for redress; because the Secretary of State has no direct authority in respect of the matter complained of, and was not a competent tribunal to

¹ November 2d. Before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN and ERLE, JJ.

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receive the application. We are also of opinion that proof of falsehood in a part of the statement is evidence for the jury, to renew the presumption of malice where the occasion of the publication has been evidence to rebut it. We are also of opinion that the libel is capable of the meaning imputed by the innuendo: and, as the jury have found it to be true, and the Judge is not dissatisfied with the verdict, the rule is not granted.

Rule refused.

[906] Judgment having been entered for the plaintiff in the Queen's Bench, error was brought in the Exchequer Chamber.

Besides the common assignment of errors, it was specially assigned for error, that the innuendoes in the declaration were bad in law, and improperly attempted to extend the meaning of the alleged defamatory matter beyond its natural and proper meaning and construction, and beyond the meaning which could by law be put thereupon: and that there were no proper or sufficient innuendoes to explain the meaning of the alleged defamatory matter and show that it was actionable, the said matter not being actionable without innuendoes.

The case was argued in this vacation (June 15th).

Peacock, for the plaintiff in error. The letter does not amount to a charge that the plaintiff was an accomplice in the embezzlement: the innuendo, therefore, that he was such accomplice is too large. Neither the allegation that he was intimate with the person accused of that offence, nor that he and his friends were parties to transactions connected with the accommodation bills, can justify the innuendo. It is not stated whether the plaintiff was the party giving or receiving accommodation by means of the bills. Circumstances of suspicion, at most, are indicated. If the plaintiff accommodated Gutteridge, and he committed felony to take up the bills, that would be no offence in the [907] plaintiff: it is not stated that he even knew how the proceeds of the felony were applied. The declaration with the innuendo would require a very different plea of justification from that which would suffice if the innuendo were not there. Whether the innuendo extends the meaning of the libel is for the Court to decide, and not for the jury. If a libel is not intelligible without extraneous matter, such matter must be set out in the

inducement for the information of the Court. All that the jury have to find, as to the extraneous matter, is whether the libel was published with reference to it: when that is found, it is exclusively for the Court to decide whether the publication, so connected, is a libel.

Hawkins, *contra*, was not heard.

WILDE, C. J. It is quite clear that the judgment must be affirmed. It is impossible to doubt that the object of the letter was to defame the plaintiff, and also that it would have that effect. (His Lordship then went through the various allegations in the letter, and commented on their libellous character and on their injurious tendency as addressed to a Minister of State, under whose superintendence a prosecution against a public functionary in respect of such matters as were charged in the letter might be instituted.) The defendant now seeks to reason away all the meaning which out of court he intended his letter to convey. No man out of court could read his letter without thinking that if it were true, the plaintiff ought instantly to be removed from his office. Thus far without the innuendo. A question has been raised whether it was competent to the jury to find the truth of the innuendo; and it is said that the matter should not have been left * to the jury. Undoubtedly it is the duty [* 908] of the Judge to say whether a publication is *capable* of the meaning ascribed to it by an innuendo: but, when the Judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it. I think this letter was capable of the meaning ascribed to it. With or without the innuendo, in either case, I think the plaintiff entitled to judgment; for the letter in itself discloses a cause of action, and is also such as to justify the finding the truth of the innuendo.

COLTMAN and CRESSWELL, JJ., and PARKE, ALDERSON, ROLFE, and PLATT, BB., concurred. *Judgment affirmed.*

ENGLISH NOTES.

In *Parmiter v. Coupland* (1840), 6 M. & W. 105, 9 L. J. Ex. 202, 203, Baron PARKE said: "For a very long period — ever since I have been acquainted with the law. — I have understood the correct practice in cases of libel, as in other cases of a criminal nature, to be for the Judge to give the jury a legal definition of a libel, and then to leave it to them to say whether, in the particular case, the facts necessary to

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constitute a libel are proved to their satisfaction. And there is no difference in this respect between a libel which is the subject of a criminal prosecution, and one which is the subject of a civil action. . . . Mr. Fox's Libel Act (32 Geo. III. c. 60) is a declaratory Act, and did not in my opinion introduce any new principle: the rule was the same in civil as in criminal cases."

In *Cor v. Lee* (1869), L. R., 4 Ex. 284, 38 L. J. Ex. 219, 21 L. T. 178, it was held by the Court that a charge of ingratitude for pecuniary assistance made against a person holding an esteemed position as a resident and proprietor of a newspaper in a certain county, was proper to be submitted to the jury for them to determine whether it came within the definition of a libel, and that, although in the alleged libellous publication facts were stated as the ground of the charge which did not warrant the opprobrious language, the publication might still be libellous by raising a doubt whether there are not facts justifying the charge. Therefore, though the charge is coupled with statements tending to explain it, it is still a question for the jury whether the words were used under such circumstances as to make them libellous.

In *Hunt v. Goodlake* (1873), 43 L. J. C. P. 54, 29 L. T. 472, a libel alleged to have been published in the *Times* newspaper said that the plaintiff "is not and never was a captain in the Royal Artillery; as has been erroneously described." The innuendo was that the defendant thereby meant that the plaintiff was an impostor and had falsely and fraudulently represented himself to be a captain in the Royal Artillery. The truth was that the plaintiff had been a paymaster, and had been appointed by the Queen's commission "to have the honorary rank of a Captain in our Army." The plaintiff was nonsuited by the judge, and a rule to set aside the verdict was discharged, on the ground that the words of the publication were not capable of the meaning put upon them by the innuendo. KEATING, J., said, "I agree that the question — What is the meaning of the words alleged to be defamatory? — must be left to the jury, when that meaning is a matter of doubt, but some limit must be adopted to this doctrine; the true rule seems to be that if, at the end of the plaintiff's case, the words complained of can be reasonably construed in the sense put upon them by the innuendo, it is for the jury to say whether they are used in that sense; if they cannot be so construed, the judge must nonsuit the plaintiff." The principal case was approved.

In *Mulligan v. Cole* (1875), L. R., 10 Q. B. 549, 44 L. J. Q. B. 153, 33 L. T. 12, an advertisement in a newspaper ran as follows: "Walsall Science and Art Institute. The public are respectfully informed that Mr. Mulligan's (meaning the plaintiff's) connection

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with the Institute has ceased, and that he is not authorised to receive subscriptions on its behalf, signed Cole & others (the defendants).” The innuendo was that the plaintiff falsely pretended to be authorised to receive subscriptions on behalf of the Institute. It was held that no action lay, for the words were not, to an ordinary reader, capable of conveying the imputation ascribed to them.

In *Hart v. Wall* (1877), 2 C. P. D. 146, 46 L. J. C. P. 227, 25 W. R. 373, the plaintiffs having advertised that they were about to sing at certain music halls at which they had been engaged to sing in public, and that they had the permission of certain music publishers to sing any *morceaux* from their musical publications, the defendant wrote to the proprietors of the music halls letters containing the following and similar statements: “Although I know that it is quite unintentional on the part of the lady advertisers (the plaintiffs), the advertisement, if relied upon in every particular by proprietors engaging them, is calculated to lead such proprietors to incur the penalties under the copyright Act in certain cases, as I hold the power of attorney over the performing rights of certain musical publications belonging to two houses therein named, who only have the copyright vested in them, and a separate and distinct property never held by them.” The innuendo alleged was that the plaintiffs had no right to sing certain songs which they advertised themselves as about to sing at the music halls. The result was that the plaintiffs lost some of the engagements. The plaintiffs were nonsuited by the judge on the ground that the letters were not libellous. A rule to set aside the nonsuit was made absolute on the ground that the meaning of the letters was for the jury and not for the judge. Lord COLERIDGE, C. J., said: “The question we have to consider in determining whether the nonsuit was right is, not whether these letters are capable of an innocent interpretation (as contended by the counsel for the defendant) but whether they are not reasonably capable of a libellous and malicious construction, because, if the letters can reasonably bear a libellous construction, the question is entirely for the jury to say what construction ought to be put upon them.”

In *Capital and Counties Bank v. Henty & Sons* (H. L. 1882), 7 App. Cas. 741, 52 L. J. Q. B. 232, 47 L. T. 662, 31 W. R. 157. Henty & Sons, a firm of brewers, were in the habit of receiving in payment from their customers cheques on various branches of the Capital and Counties Bank, which the bank cashed for the convenience of Henty & Sons at a particular branch. Having had a dispute with the manager of that branch, Henty & Sons sent a printed circular to a large number of the customers of the bank, who knew nothing of the dispute, containing the following statement: “Henty & Sons hereby

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give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank." The circular became known to other persons. There was a run on the bank and considerable loss inflicted on it thereby. There was no evidence of the innuendo except what might appear from the publication itself. The jury at the trial being unable to agree, the defendants moved for judgment on the ground that there was no case to go to the jury. They were unsuccessful in the Common Pleas, but succeeded in the Court of Appeal. It was held by the House of Lords (Lord SELBORNE, L. C., Lord BLACKBURN, Lord WATSON and Lord BRAMWELL, *diss.* Lord PENZANCE), that the words were not libellous in their plain and natural meaning, and, no circumstances having been given in evidence to show why the persons receiving the circular should infer from it any more than was said, there was no case to go to the jury. Lord SELBORNE in delivering his judgment in the House of Lords said: "I do not understand any of the learned Judges in the Courts below to have been of opinion that the question of libel or no libel must always, and necessarily, be left to a jury as to words not in themselves (that is, in their proper and natural meaning, according to the ordinary rules for the interpretation of written instruments) libellous, without some evidence either of a libellous purpose on the part of the writer, or of some other extrinsic facts calculated to lead reasonable men to understand them in a libellous sense. I should myself be very sorry if such were the law." The learned lord then cited with approval the opinion of WILDE, C. J., in the principal case, and proceeded: "If the Judge, taking into account the manner and the occasion of the publication, and all other facts which are properly in evidence, is not satisfied that the words are capable of the meaning ascribed to them, then it is not his duty to leave the question raised by the innuendo to the jury. In deciding that question he ought not to take into account any mere conjectures which a person reading the document might perhaps form as to some out of various motives or reasons which might have actuated the writer, unless there is something in the document itself or in other facts properly in evidence which to a reasonable mind would suggest, as implied in the publication, those particular motives and reasons." Lord BLACKBURN delivered a judgment substantially to the same effect, Lords WATSON and BRAMWELL concurred, the latter observing that no witness had been called who had received the circular and who acted upon it as imputing insolvency. Lord PENZANCE however emphatically dissented, considering that an imputation on the plaintiff's credit would be the first and most obvious reason for the statement in the circular which would arise in the mind of any one reading it, and that the question ought to have been submitted to a jury accordingly.

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The question of publication of a libel is a mixed question of law and fact. The jury find the facts relied upon for establishing publication, and the judge decides whether the facts so found constitute publication in law.

In questions of privilege it is for the judge to decide whether the occasion was privileged, and for the jury whether the communication was privileged. *Per* CAMPBELL, C. J., in *Dickson v. Earl of Wilton* (1859), 1 F. & F. at p. 419; *per* LINDLEY, L. J., in *Stuart v. Bell* (1891), 1891, 2 Q. B. at p. 345, 60 L. J. Q. B. at p. 579; *per* LOPES, L. J., in *Pullman v. Hill* (1892), 1892, 1 Q. B. at p. 529. In *Clarke v. Molyneux* (C. A. 1878), 3 Q. B. D. 237, 47 L. J. Q. B. 230, 37 L. T. 694, 26 W. R. 104, it was laid down that if the judge found the occasion privileged, he ought to direct the jury that unless they are satisfied that the defendant did not use the occasion for the reason which conferred the privilege, but for some indirect reason or motive, they must find for the defendant; that the burden of proving the wrong motive is on the plaintiff; and that if the wrong motive is malice, he must show actual malice, and it is not enough to show absence of reasonable cause.

Where the question is raised of fair and *bonâ fide* comment on matters of public interest, the judge decides whether the matter was of public interest, and the jury then considers whether the comment was fair and *bonâ fide* or otherwise. *Merivale v. Carson* (C. A. 1887), 20 Q. B. D. 275, 58 L. T. 331, 36 W. R. 231, confirming *Campbell v. Spottiswoode* (1863), 3 B. & S. 769, 32 L. J. Q. B. 185.

Where in an action for libel the judge rules the occasion privileged, it is not enough to exonerate the defendant for the jury to find that the defamatory statement was in excess of the occasion, unless they find that the defendant was actuated by malice. *Nerill v. Fine Arts, &c. Co.* (14 Feb. 1895), 1895, 2 Q. B. 156, 64 L. J. Q. B. 681, 72 L. T. 525. For if they meant that the language was in excess of the occasion so as to take away the privilege, that would be contrary to the judge's ruling; if they only meant excess in the sense that malice might be inferred, the finding was immaterial without an express statement that they did draw that inference.

AMERICAN NOTES.

The language of the Rule is precisely adopted from the principal case in *Townshend on Slander and Libel*, sect. 284.

This is supported by *Dottarer v. Bushey*, 16 Pennsylvania State, 204; *Dunnell v. Fiske*, 11 Metcalf (Mass.), 551; *Marshall v. Gunter*, 6 Richardson Law (So. Car.), 419; *Justice v. Kirlin*, 17 Indiana, 588; *Hays v. Mather*, 15 Illinois Appellate, 30, citing the principal case; *Gregory v. Atkins*, 42 Vermont, 237.

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In *Cooper* (James Fenimore, the novelist) v. *Greeley* (the editor of the New York "Tribune"), 1 Denio (N. Y.), 317, the Supreme Court said: "The innuendo in this case, which states the meaning of the publication to be that the plaintiff, in consequence of being known in the County of Oswego, was in bad repute there, and would not for that reason like to bring a suit for libel in that county, appears to me to express the true meaning of the publication. The question whether the alleged libel was published of and concerning the plaintiff, and whether the true meaning of the words is such as is alleged in the innuendo or not, is a question of fact which belongs to the jury, and not to the Court to determine." *Van Vechten v. Hopkins*, 5 Johnson, 211; (4 Am. Dec. 339); *Goodrich v. Woolcott*, 3 Cowen, 231; *Peake v. Oldham*, Cowp. 275; 2 Bl. R. 961; *Dexter v. Taber*, 12 Johnson, 239."

In *Petsch v. St. Paul D. P. Co.*, 40 Minnesota, 291, it was held that where the language is libellous and fairly susceptible of the meaning claimed for it by the plaintiff, it is proper to aver in the complaint the meaning as intended by the defendant and as understood by readers, and such averments raise a question of fact.

If the words are capable of the meaning ascribed to them by the innuendo, it is for the jury to determine whether they were used in that sense. *Price v. Conway*, 134 Pennsylvania State, 340; 19 Am. St. Rep. 704.

Where any doubt exists as to the meaning of a publication, so that extrinsic evidence is needed to determine its character, its significance is a question for the jury. *Bourresau v. Detroit E. J. Co.*, 63 Michigan, 425; 6 Am. St. Rep. 320; *Rodgers v. Kline*, 56 Mississippi, 808; 31 Am. Rep. 389.

Where an article is not ambiguous, the question of the meaning is for the Court, but where it is ambiguous, the meaning is a question for the jury. *Mosier v. Stoll*, 119 Indiana, 241; *Pratt v. Pioneer Press Co.*, 30 Minnesota, 41; *Lewis v. Chapman*, 16 New York, 369.

2 Thompson on Trials, sect. 2031, says, whether the meaning is such as is charged in the innuendo is a question for the jury. As where the charge was of a woman's "keeping" a man not her husband, with innuendo that adultery was meant. *Henicke v. Griffith*, 29 Kansas, 516.

"It is only when the Court can say that the publication is not reasonably capable of any defamatory meaning, and cannot reasonably be understood in any defamatory sense, that the Court can rule as matter of law, that the publication is not libellous, and withdraw the case from the jury, or order a verdict for the defendant." *Twombly v. Monroe*, 136 Massachusetts, 469.

A very celebrated case is *Bloss v. Tobey*, 2 Pickering (Massachusetts), 320, where the declaration averred, with suitable innuendoes, that the defendant charged the plaintiff with the offence of burning his own store. The Court held that this charged no crime and arrested judgment. (This decision drove from the profession of the law, in disgust, the plaintiff's attorney, William Cullen Bryant, and gained for the world an exquisite poet and man of letters, no longer "forced to drudge for the dregs of men, and scrawl strange words with a barbarous pen.") The same Court, in *Thomas v. Blasdale*, 117 Massachusetts, 438, held that the words, "He killed her by his bad conduct, and I think he knows more about her being drowned than any-

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body else. He is to blame for it," are not actionable in the absence of an innuendo charging the design to impute the crime of murder.

In *Lewis v. Daily News Co.*, 32 Atlantic Reporter, 246, the Court of Appeals of Maryland decide that upon demurrer, it is always the province of the Court to determine whether the words charged in the declaration are libellous, and whether the innuendoes explaining them are fairly warranted by the language declared on; that every publication injurious to the character is presumed to be false and malicious until the truth thereof is pleaded, or it is shown that the occasion or motive justified the utterance, and that to falsely publish that plaintiff "would be an anarchist if he thought it would pay," explained by innuendoes to mean that plaintiff, for a money consideration, would engage in the unlawful, treasonable, and felonious designs of anarchists, and that an anarchist is a person who, actuated by mere lust of plunder, seeks to overturn by violence all constituted forms and institutions of society and law and order, and all right of property, is libellous.

In *Gregory v. Atkins*, 42 Vermont, 250, the Court said: "Their province, in an action of this character, is to find out whether or not the publication was made by the defendant, whether it was with intent to injure the plaintiff, or whether it was malicious and false, as well as to find that its sense and meaning is as set forth in the declaration. These are all elements and matters of fact which enter into and constitute the article libellous; but with these facts ascertained, the legal quality of the article is for the Court, and as much so as the language of a written contract, which is always, when unambiguous, a matter of legal construction. . . . When the language is ambiguous, or susceptible of a double meaning — one innocent and harmless, the other libellous and injurious — the sense is always for the jury to find, as well as to find and to say whether the innuendoes of the declaration, explanatory of the meaning, are justified by the words; and it is in this view that the question, whether a libel or not, is for the jury."

In Pennsylvania the Court is bound to instruct the jury whether the publication is or is not libellous. *Pittock v. O'Niell*, 63 Pennsylvania State, 253.

No. 12. — *Thorley's Cattle Food Company v. Massam*, 14 Ch. D. 763, 764. — Rule.

SECTION VII. — *Slander of Goods of Rival Trader.*

No. 12. — THORLEY'S CATTLE FOOD COMPANY *v.*
MASSAM.

(C. A. 1880.)

No. 13. — WHITE *v.* MELLIN.

(H. L. 1895.)

RULE.

To maintain an action for disparaging statements concerning his goods, the plaintiff must show: (a) that the statements were made with respect to the goods of the plaintiff in particular; (b) that they were untrue; and (c) that the plaintiff has suffered special damage.

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14 Ch. D. 763-784 (s. c. 42 L. T. 851; 28 W. R. 966).

Defamation. — Slander of Goods of Rival Trader. — Injunction.

[763] Joseph Thorley died in 1876, having for years carried on the manufacture of a condiment well known as "Thorley's Food for Cattle." His executors continued his business. In 1877 a company was formed for manufacturing the same article, and employed a brother of Joseph Thorley who was acquainted with the secret of the manufacture. The executors published in the newspapers an advertisement warning the public that any food purporting to be Thorley's food for cattle, and not signed "Joseph Thorley," was not the manufacture of the establishment carrying on business as Joseph Thorley, the proprietors of which were alone possessed of the secret for compounding the food. The executors also issued a circular to their customers warning them against the course pursued by the company "in seeking to foist upon the public an article which they pretend is the same as that manufactured by the late Joseph Thorley." The Court came to the conclusion that there was no substantial difference between the food sold by the executors and that sold by the company: —

Held, by MALINS, V. C., and by the Court of Appeal, that the advertisement and circular contained untrue representations calculated to injure the company in their trade, and that the issuing of them ought to be restrained by injunction.

This was an action by J. W. Thorley's Cattle Food Company against the executors of the late Joseph Thorley, who had for

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many years before his death carried on the manufacture and sale of a compound known as "Thorley's Food for Cattle," for an injunction to restrain the defendants from advertising or representing in their advertisements or circulars that they were alone possessed of the secret for compounding the condiment known as "Thorley's Food for Cattle," and from representing that the cattle food manufactured and sold by the plaintiffs was spurious, or not genuine, or not compounded in accordance with the true recipe, of the same ingredients, and in the same proportions, and in the same manner as the condiment known as "Thorley's Food for Cattle," manufactured and sold by Joseph Thorley in his lifetime.

Joseph Thorley died in November, 1876, and his executors continued his business. In March, 1877, the company was formed for the purpose of manufacturing and selling the same article, and J. W. Thorley, a brother of Joseph Thorley, who had been employed in Joseph Thorley's business and was acquainted with the process, was employed by the company to conduct the manufacture.

Shortly after the formation of the company the executors of Joseph Thorley commenced an action against the company to restrain them from using the name of "Thorley's Food for Cattle," and from selling as "Thorley's Food for Cattle" food not manufactured by the executors. A motion for an injunction was heard by Vice-Chancellor MALINS on the 14th of June, 1877, and was refused, his Lordship being of opinion that the food sold by the company was shown by the evidence to be the same food as that manufactured by the executors, and that the company had a right to sell it as they did (6 Ch. D. 574).

The executors thereupon discontinued their action, and in the * same month published in various newspapers the [*765] following advertisement:—

"CAUTION. — Thorley's Food for Cattle.

"The public, and in particular farmers, graziers, dealers, and others purchasing this world-famed food, are warned that any food for cattle purporting to be 'Thorley's Food for Cattle,' and not signed with the name 'Joseph Thorley,' is not the manufacture of this establishment, carrying on business as Joseph Thorley, the proprietors of which are alone possessed of the secret for compounding that famous condiment, and carry on business at Pembroke Wharf, Caledonian Road."

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The executors also distributed among their customers a circular which was in part as follows: —

“ In sending you our circular as to the efficacy of the well-known ‘ Cattle Food ’ manufactured by the late Mr. Joseph Thorley for twenty years past, and which has attained such world-wide notoriety as the best cattle food ever offered to the public, we think it well to warn you against the course pursued by a company which has lately been registered with a nominal capital of only £200 and a paid-up capital of a few shillings, in seeking to foist upon the public an article which they pretend is the same as that manufactured by the late Joseph Thorley.”

The company thereupon commenced the present action. The case first came on upon motion for an injunction on the 30th of June, 1877 (reported 6 Ch. D. 582), and Vice-Chancellor MALINS expressed a strong opinion that the executors were not justified in issuing the above advertisement, but declined to grant an injunction upon an interlocutory application.

After the hearing of the motion the statement of claim was filed which contained an allegation that the advertisement and circular had caused damage to the trade of the company by preventing customers and proposed customers from purchasing the food manufactured by them, and the action now came on for trial. Evidence was adduced by the plaintiffs that in consequence of the advertisements and circulars many customers of the company [* 766] * had returned packages of the cattle food which had been ordered by them, and others had refused to deal with them on the ground that the cattle food supplied by the plaintiffs was not the genuine condiment as formerly manufactured by the late Joseph Thorley. There was also much evidence given by scientific witnesses to prove on behalf of the plaintiffs that the cattle food manufactured and sold by them was precisely the same as that which was made by the defendants; and by other scientific witnesses to prove on behalf of the defendants that there was a considerable difference between the two condiments, the object of the defendants being to show that the plaintiffs could not consequently be acquainted with the secret for compounding the genuine cattle food as sold by the late Joseph Thorley. Both the VICE-CHANCELLOR and the Court of Appeal came to the conclusion that the articles manufactured by the executors and by the company were substantially the same.

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The action came on for trial before Vice-Chancellor MALINS on the 11th of February, 1880.

Higgins, Q. C., and Townsend, for the plaintiffs:—

Upon the motion for an injunction your Lordship expressed your opinion that the advertisement now complained of was untrue, and calculated to injure the trade of the defendants. We submit that special damage (if that is necessary) has been fully proved by our witnesses. We have now brought the case clearly within the authorities where the Court has restrained the publication of advertisements and circulars calculated to cause, and which have caused, injury to trade. The Court has granted injunctions upon much weaker grounds than we have here. An injunction was granted to restrain the publication of a book which was alleged to have been written by a person who denied the authorship, *Lord Byron v. Johnston*, 2 Mer. 29 (16 R. R. 135); and in *Routh v. Webster*, 10 Beav. 561, the MASTER OF THE ROLLS restrained the defendants from advertising the plaintiff's name as a provisional director of a company without his authority, on the ground that it might subject him to responsibility. It is true that in *Clark v. Freeman*, 11 Beav. 112, an *injunction was [*767] refused to restrain the use of a person's name as the author of a medicine, but there was no proof of money damage; and Lord CAIRNS, in *Maxwell v. Hogg*, L. R., 2 Ch. 307, said that he had always thought the case of *Clark v. Freeman* might have been decided differently.

It was held in the *Western Counties Manure Company v. Lawes Chemical Manure Company*, L. R., 9 Ex. 218, that to print and publish of a tradesman, falsely and without lawful occasion, that the goods sold by him were inferior in quality to similar goods sold by his rival, was actionable if special damage resulted, and similar decisions were given in *Young v. Macrae*, 3 B. & S. 264, and *Riding v. Smith*, 1 Ex. D. 91; and also in *Tabart v. Tipper*, 1 Camp. 350 (10 R. R. 698), it was held that to tax a bookseller falsely with having published an absurd poem was actionable if the evident tendency was to injure the bookseller in his business. The utmost that can be requisite to bring this case within these authorities is to show special damage, and that we have done; and *Saxby v. Easterbrook*, 3 C. P. D. 339, is an authority that a verdict that a published statement is libellous may now be given by the Judge who tries the action. We further submit that, sup-

posing no special damage proved, still it is evident that the statements made by the defendants are calculated to injure the plaintiffs' trade, and therefore, upon the decision in *Hookham v. Pottage*, L. R., 8 Ch. 91, the Court will restrain a continuance of the injury. In *Hurichs v. Bernides* (before the M. R., Jan. 18, 1878; W. N. of 1878, p. 11) the MASTER OF THE ROLLS observed that he was not prepared to say that if, under the Judicature Act a plaintiff could sustain an action for libel, this Court would not at the hearing award damages for the libel and restrain the continuance of its publication. We ask for damages, and for an injunction in the terms of the claim.

[They also cited Folkard on Slander, p. 167.]

Glasse, Q. C., and Nalder, for the defendants:—

Since this case was last before the Court we have discovered that the cattle food made by the plaintiffs is not the same [* 768] as *that which we compound from the original recipe.

It is also proved that we have improved upon the original receipt by the addition of more of the expensive ingredients. Under these circumstances we are justified in advertising that we are alone possessed of the secret for compounding the original condiment, and that the plaintiff's cattle food is not the genuine article as manufactured by the late Joseph Thorley.

Then as to the jurisdiction of the Court, the cases cited do not show that there is any power in a case like this to grant an injunction. No special damage has been shown. The evidence as to damage is of the most vague description, and the plaintiffs have gone on increasing their trade notwithstanding our advertisements. We are carrying on the original business of Joseph Thorley, and the plaintiffs are using our name and issuing advertisements quite as much calculated to injure our trade as ours could possibly be to injure theirs, and we have been driven to make public the true state of facts. The case of *Prudential Assurance Company v. Knott*, L. R., 10 Ch. 142, is distinctly in our favour, since it was there held that the Court has no jurisdiction to restrain the publication of a libel even if it is injurious to property; and in that case the opinion of the Court of Appeal was adverse to the decisions in *Dixon v. Holden*, L. R., 7 Eq. 488, and *Springhead Spinning Company v. Riley*, L. R., 6 Eq. 551. So in *Sarby v. Easterbrook* it was laid down by Lord COLERIDGE that the question of libel or no libel was one peculiarly for a jury, and the Court would not

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interfere by injunction until the publication was found by a jury to be libellous; and Mr. Justice LINDLEY gave his opinion to the same effect. In all the other cases cited there was injury distinctly proved. This case must have been launched on the decision in *James v. James*, L. R., 13 Eq. 421, but there it was said that a man who sold an article compounded from a secret which he had discovered must not do anything to lead the public to suppose that his preparation was the manufacture of the successors in business of the original discoverer. These plaintiffs have been doing what they could to induce the public to believe that they are carrying on the business of Joseph Thorley, and we were bound in *self-defence to make the statements we have made. But [* 769] our advertisement is not libellous. It is not a libel upon the plaintiffs, even if it is not true, to say that we are the only possessors of the secret. Any man may say, "I alone know how to make the article." It may be untrue, just as half the advertisements are which we daily read, but it is not a libel.

Higgins, in reply, cited *Erans v. Horries*, 1 H. & N. 251, where, in an action for slander for words spoken of the plaintiff in his trade or business, with a general allegation of loss of business, it was held to be competent to the plaintiff to prove, and the jury to assess, damages for a general loss or decrease of trade, although the declaration alleged the loss of particular customers as special damage which was not proved.

MALINS, V. C. :—

The object of this action is to restrain the defendants, that is, the executors of the late Joseph Thorley, from issuing any advertisement in which it is stated "that they are alone possessed of the secret for compounding that famous condiment," namely, "Thorley's Cattle Food." The circumstances of this action were before the Court at great length in June, 1877, and my judgment on the motion then made is reported. (6 Ch. D. 582.) The facts then proved were that the secret, whatever it was, was communicated by a person named Fawcett to the late Joseph Thorley and to his brother Josiah. Joseph Thorley made a payment to Fawcett of £4 a ton on all the food that was sold. Josiah Thorley, the brother of Joseph, was in his employment for twenty-two years, in one capacity or another: and from 1857, when Joseph began to make his cattle food, Josiah was his managing man till 1868, a period of eleven years, and Josiah knew all about the pro-

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duction of this cattle food just as well as his brother Joseph himself. I have already decided that both brothers had an equal knowledge respecting the production of this article. In 1868 some difference arose between the two brothers and Josiah left Joseph, and nothing can be more clear to my mind than that

Josiah might, the very day after they separated, have set [770] up business in opposition to his *brother, and might have sold this food made from the same recipe under the same name — “Thorley's Cattle Food” — and it would have been impossible for Joseph to have prevented his doing so. Some time after the separation of the two brothers they became reconciled, and lived together again on terms of friendship, so much so, that in 1873, Joseph, in making his will — that is, five years after the quarrel — appointed Josiah one of his executors, though for some reason that appointment was revoked by a codicil. Now the state of things existing at the death of Joseph was this: The business was in full vigour. The executors had all the rights which he had. They had the right to sell the food, and they continued the business, and certainly any person of the name of Thorley was entitled to make the same food, if he had the same means of doing so, and to call it “Thorley's Cattle Food;” but Josiah, it seems, had no capital, and he was obliged to apply to other people, and they formed a company, the capital of which was £200 in 4000 shares of 1s. each. I think it is to be regretted that the law has not provided what is the minimum amount of capital a company may have, or the minimum amount of the shares, but I am not aware of anything to prevent the capital being 4000 shillings or 4000 farthings. Suppose Josiah Thorley had commenced business on his own account with a capital of £200 only, — many men have begun business with less who have achieved great success, — could it be an objection to him that he began with so small a capital if he did nothing to violate the law? It is clear to my mind that no objection can be raised to a company because it consists of a small amount of capital or a small number of shares, provided the law is complied with. The first application made to me was an action by the present defendants to prevent Josiah Thorley and the company from selling the food under the denomination of “Thorley's Cattle Food.” I then decided, and my decision is reported (6 Ch. D. 574), that any person who had become acquainted with the process of manufacturing an article which is in general

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request is entitled to manufacture it, and if the name of the first manufacturer has become attached to the article, any person manufacturing it afterwards is entitled to describe it by the name of such original manufacturer, and if he *happens to [* 771] be of the same name, he may use his own name in describing his business or allow it to be used by a company formed by himself for the purpose of carrying on the business, notwithstanding that the representatives of the original manufacturer continue to carry on the old manufacture under the old name. The result of that action was that after I had refused the motion on behalf of the executors of Joseph Thorley to restrain Thorley's Cattle Food Company from using the name, the plaintiffs dismissed their action with costs, showing that they acquiesced in my decision that Josiah was entitled to sell the food he was selling, and was entitled to do all that he was then doing. But having taken that course, it appears that the executors of Joseph Thorley, twelve days afterwards, issued the advertisements which are complained of.

The first part of the advertisement, although it is of the usual boasting character, would not have been objected to, but what the plaintiffs object to are these words, "the proprietors of which are alone possessed of the secret for compounding that famous condiment." Now, considering that the Court has decided on the 14th of June that the article produced by Josiah Thorley was precisely the same as that produced by Joseph Thorley himself and afterwards by his executors, and that Josiah Thorley was entitled to sell his food under this name, I cannot see how the executors could with propriety issue this advertisement. Thorley's Cattle Food Company felt that this was very injurious, and likely to be injurious to them, and therefore they moved before me on the 30th of June for an injunction, the result of which motion is reported in the same volume (6 Ch. D. 582). I then went very fully into the matter, and though I was very clear that the advertisement was wholly objectionable and unjustifiable, yet, inasmuch as there was a great conflict of authority as to the power of the Court to grant an injunction to prevent the publication of a libel, I thought it better that the case should be decided at the hearing of the action, and I simply refused the motion upon that technical ground, and I certainly hoped that the strong opinion I then expressed would have led to a stoppage of the advertisement. I

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find, however, that although the defendants have abstained [* 772] from issuing that *advertisement since the 30th of June,

1877, they still claim the right to do so, and if I do not now interfere against them there is no doubt whatever that the advertisement will continue to be issued, because it is proved that between the 14th and the 30th of June hundreds of advertisements were issued in every London and, I may say, almost every country newspaper in the terms I have just read.

Now, if I was right in my judgment on the 30th of June, they certainly are not entitled to issue that advertisement, because they are not alone possessed of the secret; and I am as satisfied from the evidence which has been brought before me on this occasion as I was then that Josiah is just as much in possession of the secret as Joseph was or the executors can be, and therefore they are not entitled to state that they alone are in possession of the secret.

But in order to get rid of that difficulty a great body of evidence, including many scientific witnesses on both sides, has been brought before me, which has occupied about eight or nine days, in order to prove on the part of the plaintiffs that there is no substantial difference between the food produced by the company and that produced by the executors; and on the part of the defendants to prove that there is a difference, and that the food produced by the executors is superior to that of the company, and that it could not have been made from the same recipe. Mr. Glasse seemed very much to rest his case for the defendants upon an improvement since the death of Joseph Thorley, but the cattle food as made by Joseph Thorley during his life is the food which the executors are now professing to sell without any variation, and they do not put their case upon any improvement which has been made in it.

[His Lordship then commented upon the scientific evidence adduced, and said that in his opinion none of the witnesses had proved any substantial difference to exist between the cattle food made by the plaintiffs and that made by the defendants, and continued:—]

Now, therefore, coming, as I do, without the slightest doubt, to the opinion that the food as made by the company is identical with the food made by Joseph's executors, there is no justification for their asserting that theirs is different from the com- [* 773] pany's *food. Therefore the question I have to decide is,

whether they were justified in issuing the advertisement, and, having issued it, whether they can be allowed to continue it.

Now, that they were not justified in issuing it, is, I think, abundantly clear from the opinion I expressed in 1877. "The proprietors of which are alone possessed of the secret for compounding that famous condiment" is an untrue statement, and an untrue statement ought not to be made for the purpose of pushing a trade.

Then comes the question which has been so much argued, whether the Court can interfere. Now, I do not intend to say anything more upon the question of the propriety or power of this Court to interfere to prevent the publication of a libel injurious to character, and therefore, being injurious to character, also injurious to the property of an individual. Upon that subject I have fully expressed my opinion in my judgment of the 30th of June last year. I refer to that report, and to all that I then said I adhere. It is not necessary upon the present occasion for me to go further into that subject, because what I have now to decide is whether one man is entitled to publish an advertisement or make a statement injurious to the business of another.

First, then, is this a statement calculated to injure the business of the plaintiffs? The world at large may be inclined to buy either the defendants' or the plaintiffs' condiment; probably if they could be satisfied that they are equal in quality they would be influenced either by personal favour or by the price. But if the defendants in this case are at liberty to say that they alone are possessed of the secret, the effect is to tell the public: there is only one place in the world at which "Thorley's Cattle Food" can be obtained, and if you go to any other place you will not get the genuine thing, but a spurious article. That is calculated to attract all the public to buy the defendants' food, and to prevent them from buying the plaintiffs'. In my opinion such a statement is directly calculated to injure the business of the plaintiffs. I am told, however, that there is no evidence of injury, but in fact I have positive evidence of injury, because it is proved by Mr. Eley, one of the directors of the company, that goods have been returned to them in consequence of that advertisement, *because the purchasers were led to believe that it [*774] was not a genuine article.

But I do not think that kind of evidence is necessary, because

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if the Court sees clearly that the advertisement in itself is calculated to injure, that is, in my opinion, quite sufficient, without any positive evidence that injury has been sustained. I acted on that principle in the case of *Hookham v. Pottage*, L. R., 8 Ch. 91, where the name was painted over a shop so as to lead the public, going into the shop, to believe that they were going into Hookham's shop, when in fact they were going into that of Pottage. I said there it was not necessary to prove any injury if the Court saw plainly that what was done was calculated to injure. My decision in that case was affirmed by the Court of Appeal, and for the same reasons, because Lord Justice JAMES, in giving judgment, said he entirely concurred with the VICE-CHANCELLOR. I therefore consider it clear that it is not necessary in these cases to prove actual injury where the Court sees that the advertisement or publication is of itself calculated to injure.

Therefore, I am clearly of opinion that the assertion that there is but one place at which this article can be obtained genuine, is calculated to injure the business of the plaintiff.

Then how stand the authorities on this subject? It is now, I apprehend, settled that you may not issue an advertisement calculated to injure a person in his business. One of the last cases cited was that of *Riding v. Smith*, 1 Ex. D. 91. The action was brought — the ground of the defamation, or whatever it may be called — was that the defendant issued or made a certain statement with regard to the plaintiff's business which was calculated to injure him. That action was brought by the plaintiff, who was a grocer and draper, and was assisted by his wife in the conduct of his business, and he charged "that the defendant falsely and maliciously published of the plaintiff's wife, in relation to the business and her conduct as such assistant in the same, certain words imputing to her the commission of adultery with one Joseph Abbott upon the premises where the plaintiff resided and carried on business, whereby the plaintiff was injured in his credit, and certain persons named and many others who [* 775] had dealt with him, ceased *to do so. At the trial it was proved that the words complained of were uttered in the presence of three or more persons. The person to whom they were addressed was on her way to the church of the district, where Joseph Abbott, who had been appointed to the incumbency, was about to read himself in. No evidence was given that any of the

persons who heard the statement of the defendant had ceased to deal with the plaintiff, but there was evidence of a falling off in the profits of the business since the publication of the words complained of, and the plaintiff was unable to account for this falling off except as the consequence of the statements. A verdict was found for the plaintiff for 40s." And then the question was, whether the verdict should not be set aside. In giving judgment, the Lord Chief Baron KELLY said: "The two questions are, first, whether such an action is maintainable at all, and, secondly, whether it can be maintained without proof of something of the same kind as the special damage that would have to be proved in an action for slander. It appears to me as to the first point, that if a man states of another, who is a trader earning his livelihood by dealing in articles of trade, anything, be it what it may, the natural consequence of uttering which would be to injure the trade and prevent persons from resorting to the place of business, and it so leads to loss of trade, it is actionable. It is of little consequence whether the wrong is slander, or whether it is a statement of any other nature calculated to prevent persons resorting to the shop of the plaintiff. Here the statement was that the wife of the plaintiff was guilty of adultery, and it is the natural consequence of such a statement that persons should cease to resort to the shop. Supposing the statement made not to be slander, but something else calculated to injure the shopkeeper in the way of his trade, as for instance a statement that one of his shopmen was suffering from an infectious disease, such as scarlet fever, this would operate to prevent people coming to the shop; and whether it be slander or some other statement which has the effect I have mentioned, an action can, in my opinion, be maintained on the ground that it is a statement made to the public which would have the effect of preventing their resorting to the shop and buying goods of the owner. Then the question is, whether such a statement would be actionable

* without proof of special damage. That was requisite [* 776] in the cases of slander which have been cited, but it does not follow that it is necessarily so in such an action as the present. The cases show that in an action in respect of a statement made as to the wife or assistant of the plaintiff the words would not be actionable as slander without proof of special damage, which must be established not merely by general evi-

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dence that the business has fallen off, but by showing that particular persons have ceased to deal with the plaintiff. I hope the day will come when the principle of *Ward v. Weeks*, 7 Bing. 211, and that class of cases, shall be brought under the consideration of the Court of last resort, for the purpose of determining whether a man who utters a slander in the presence of others is not responsible for all the natural effects which will arise from those persons going about and repeating the slander, though without any express authority on his part."

No doubt Mr. Glasse, in reply to that case, said the difference between that case and the present is that damage had been sustained. There is not that difference, because I have positive evidence here that damage has been sustained by the plaintiffs in consequence of the course adopted by the defendants.

Then there is the case of *Sarby v. Easterbrook*, 3 C. P. D. 339. The head-note is, "The Court has power to issue an injunction to restrain the defendant from publishing of the plaintiff, to the injury of his trade, matter which a jury have found to be libellous. — *Semble*, that this power may be exercised by the Judge who tries the cause." At the trial before Lord COLERIDGE, C. J., it appeared that the defendants carried on business in partnership as engineers and railway signal manufacturers, and that some rivalry existed between them and the plaintiff, who carried on a similar business, and that the libels complained of were published by the defendant Hannaford. The defendant Easterbrook, who disclaimed all knowledge, was discharged. The jury found that the publications in question were libellous, and a verdict was taken against Hannaford for 40s., with costs, and the learned Judge ordered that a perpetual injunction should issue to restrain him from publishing libels of the nature complained of against [* 777] the plaintiff. A doubt, however, having been * suggested as to the power of the Judge at *Nisi Prius* to order an injunction to issue, Mr. Aston moved "That a writ of perpetual injunction do issue to restrain the defendant." I see that my judgment in this very case of *Thorley's Cattle Food Company v. Massam*, 6 Ch. D. 582, was commented upon by the learned counsel and also by the Court, and Lord COLERIDGE says this (3 C. P. D. 342): "I am of opinion that Mr. Aston is entitled to the order which he prays. This is an action for a libel, in which the plaintiff claims damages and an injunction to restrain the

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defendants from publishing libels against the plaintiff, and repetitions of acts of the like nature and description as those described in the statement of claim, to the injury of his business. An order to that effect was made by me at the trial. But, inasmuch as it seemed to be doubtful whether upon the cases in Equity such an injunction could be granted for the purpose of restraining the publication of a libel, it has been judged right to make the application to the Court."

LORD COLERIDGE then says: "Such cases there are, and they seem to me to have proceeded upon a perfectly good ground, but one which is distinguishable in principle from the case now before us. Libel or no libel, since Fox's Act, is of all questions peculiarly one for a jury; and I can well understand a Court of Equity declining to interfere to restrain the publication of that which has not been found by a jury to be libellous. Here, however, the jury have found the matter complained of to be libellous, and it is connected with the property of the plaintiff, and calculated to do material injury to it. It is that which is sought to be restrained; and upon principle it appears to me to be a proper thing to do. My Brother LINDLEY, who is more conversant with these matters than I am, informs me that all the cases where the Courts of Equity have refused to interfere were cases where the application was made before verdict. Here the jury have found the publications to be libellous and they are eminently calculated to injure the plaintiff's property in the patent rights which are assailed. I am unable to see any reason why the injunction prayed should not be granted: certainly the cases cited do not supply that reason. If the cases do not help us, they are not *in the way. All but one of them seemed to have [*778] been confined to interlocutory orders, and in that one it was sought to restrain the continuance of waste or trespass. As to sub-sect. 8 of sect. 25 of the Judicature Act of 1873, I must confess I do not appreciate its application to the matter." Mr. Justice LINDLEY says: "I am of the same opinion. I am not aware of any case in Equity which is precisely in point. The principle upon which the Courts of Equity have acted in declining to restrain the publication of matter alleged to be libellous is, that the question of libel or no libel is pre-eminently for a jury. But when a jury have found the matter complained of to be libellous and that it affects property, I see no principle by which the

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Court ought to be precluded from saying that the repetition of the libel shall be restrained. The only reason I can suggest for not granting it clearly does not exist here: and I think it would be much to be regretted if we felt ourselves compelled to refuse the order. It is, however, hardly a case for costs." Therefore, it being decided that it is calculated to injure the plaintiff, he gets an injunction to prevent a repetition of the injury.

There is the case also of the *Western Counties Manure Company v. Lawes Chemical Manure Company*, L. R., 9 Ex. 218. The defendants falsely and without lawful occasion published a statement disparaging the quality of the plaintiffs' goods, and special damages resulted from the publication. In the case now before me the disparaging of the quality of the plaintiffs' goods is perfectly clear, because if there is only one place where a genuine thing can be had, all other things must be spurious, and therefore it is just as much as if they said that what the plaintiffs sell is a spurious article. The statement set out a report from a chemical laboratory at Glasgow on various productions, and it gave the plaintiffs' mixture as being of very inferior quality, which ought to be sold at the lowest price.

Mr. Baron BRAMWELL, in his judgment, says that so far an action would not be maintainable. "But what makes the action maintainable," says his Lordship, "is the allegation that follows: 'Whereas in truth and in fact the said artificial manures so manufactured and traded in by the plaintiffs were not of inferior [* 779] *quality, and were not inferior in quality to the said articles of manure of the defendants,' and by reason of the premises certain persons who, if they had not been told that which was untrue, would have continued to deal with the plaintiffs, are alleged to have ceased to deal with them. So that it appears there was a statement published by the defendants of the plaintiffs' manufacture, which is comparatively disparaging of that manufacture, which is untrue, so far as it disparages it, and which has been productive of special damage to the plaintiffs;" and his Lordship further said: "It seems to me, however, where a plaintiff says, 'You have without lawful cause made a false statement about my goods to their comparative disparagement, which false statement has caused me to lose customers,' an action is maintainable. . . . On the general principle, therefore, that an untrue statement disparaging a man's goods published without lawful

occasion, and causing him special damage, is actionable, we give our judgment for the plaintiffs."

I think these cases at law thoroughly establish this — I do not go into the general question of libel — but they have established this doctrine: that, where one man publishes that which is injurious to another in his trade or business, that publication is actionable, and, being actionable, will be stayed by injunction, because it is a wrong which ought not to be repeated.

Now I have only one other authority to refer to which shows that a Judge of this Court takes the same view. A similar point was brought before the MASTER OF THE ROLLS; it does not seem to have gone on, and there is no final decision on the subject, and I refer to it only as showing his opinion. There is a short note of the case (*Hinrichs v. Bernades*) in the "Weekly Notes" of 1878. It was a motion on behalf of the plaintiff, who was a vendor of cigars, to restrain the defendants from publishing in the "London Tobacco Trade Review" a circular which it was alleged that the defendants Byles & Co. were about to publish in that journal. So here it was not an actual injury done, but an apprehended injury, which the plaintiff considered would injure his trade. The indorsement on the writ claimed an injunction only, and not damages, and the MASTER OF THE ROLLS ordered the motion to stand over to the hearing, and observed that he was not prepared to say that if, *under the Judicature Act, a plaintiff could maintain [*780] an action for libel, this Court would not at the hearing, while awarding damages for the libel, restrain a continuance of the publication. It seems, therefore, that he dealt with it on the same principle, — that if the publication which is about to take place may be, still more if one which has taken place is, injurious to the business of the plaintiff, that is a case for the interference of the Court, and an injunction will be granted.

Therefore, upon principle, I cannot entertain the least doubt that it is right and proper for this Court, where it sees that one trader is practising an unfair mode of trading, representing that his article is the only genuine one, from which it follows that all others are spurious, that that is so calculated to injure the business of another that this Court, seeing it is a wrong which ought not to be repeated, will prevent it by injunction.

From the authorities I have cited it is very clearly established that, where injury has been sustained, at all events it will grant

an injunction; and, moreover, the case of *Riding v. Smith*, 1 Ex. D. 91, shows that, in the opinion of the Court of Exchequer, it is not necessary to prove damage if the thing is in itself calculated to be injurious. I am therefore of opinion, first of all on the evidence of Mr. Eley, that damage has been sustained, because they have had their goods returned in consequence of this advertisement: and, being of opinion that it is calculated to injure, if I were sitting as a jury it would be my duty to give a verdict for the plaintiffs. Sitting, to a certain extent, as I do, as a jury, if it were necessary, I should find that the plaintiffs have sustained damage, and, if necessary, I should award damages to them. But for the purpose of my decision it is only necessary for me to come to that conclusion, and coming to the conclusion, as I do, first, that the materials produced by the plaintiffs and the defendants are identical as nearly as possible, the advertisement is, in my opinion, improper, and a perpetual injunction against its repetition must be granted.

Now, there is one other circumstance I ought to mention. I have said already that there is no evidence that any alteration in the mode of making the article took place after the death [* 781] of *Joseph, or by Joseph himself after Josiah had left him. And I have said that, even if there had been some minute alterations, that would not have prevented the plaintiffs' right to make this food, the cattle food, and call it by Joseph's name. He is as much Thorley as his brother was, and therefore it is cattle food made by Thorley, and it is Thorley's Cattle Food. I will adopt the well-known sentence of Lord Justice KNIGHT BRUCE in the case of *Burgess's sauce*, where he says (3 D. M. & G. 903), "All the Queen's subjects have a right if they will to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them." So in this case, all mankind are entitled to make cattle food, and every man is entitled to call the cattle food he makes by his own name. Josiah, therefore, is entitled to make cattle food and call it "Thorley's Cattle Food." He is also entitled to make it from the recipe he had from Fawcett as well as his brother; it is the same thing which he makes, for there is no evidence that it is different.

On all these grounds, therefore, I come to the conclusion that the plaintiffs have established their right to the injunction which they ask. They must have that perpetual injunction, and the

defendants must pay the costs of the suit. The injunction will be to restrain the defendants from "advertising or representing or suggesting in their advertisements or circulars that they, or such proprietors, are alone possessed of the said secret, and from representing or suggesting, or doing anything calculated to represent or suggest, that the cattle food manufactured and sold by the plaintiffs is spurious or not genuine." I think it will be sufficient to stop at those words.

Higgins, Q. C., asked that his Lordship would award damages to the plaintiffs, if only a nominal sum.

MALINS, V. C. : For the purpose, if necessary, of bringing the case within the decisions, I, as a jury, assess your damages at 40s., and upon that I grant the injunction, and the plaintiffs will have the costs of the motion.

The defendants appealed. The appeal came on to be heard, *together with an appeal in *Massam v. Thorley's* [*782] *Cattle Food Company*, 14 Ch. D. 748, on the 16th of April, 1880, but it is thought more convenient to report them separately.

Glasse, Q. C., and Nalder, for the appellants : —

Assuming that the company knew the manufacture of the food as it was made at the time when J. W. Thorley was working with his brother, we make the condiment with improvements subsequently made by Joseph Thorley, which are unknown to the company. The allegation therefore in the advertisements that we only knew the secret is strictly true, but even if the circular is a libel on the title of the company the Court will not restrain it, but will leave the plaintiffs to pursue their proper remedies. The case of *Prudential Assurance Company v. Knott*, L. R., 10 Ch. 142, is in our favour, and the cases since the Judicature Act support the view that the Court will not interfere till the matter has been tried by a jury. *Saxby v. Easterbrook*, 3 C. P. D. 339.

Higgins, Q. C., and Townsend, for the company, were not called upon.

JAMES, L. J. : —

I am of opinion that in the two documents, the advertisement and the circular, which throw light upon each other, the defendants have said more than they ought to have said. They had a right to warn the public that the company were not carrying on the business which was carried on by the defendants, and were

not the successors of Joseph Thorley; but they did more than this, — they went on to make allegations imputing to the company that they were foisting a fictitious article on the public. We think that the executors have not proved their justification of that libel. Having had our attention called to the evidence, we think that the executors have failed to prove that there was any foundation in point of fact for the assertion that the company were foisting on the public an article different in character from what they represented it to be.

[* 783] *BAGGALLAY, L. J. : —

This is an appeal from a decree of Vice-Chancellor MALINS declaring that the defendants were not entitled to advertise or represent that they or the proprietors of the establishment carrying on business as Joseph Thorley were alone possessed of the secret for compounding the condiment known as Thorley's Food for Cattle, and granting an injunction restraining the defendants from advertising or representing in their advertisements or circulars that they or such proprietors were alone possessed of the secret, and from representing or suggesting or doing anything calculated to represent or suggest that the cattle food manufactured and sold by the plaintiffs was spurious, or not genuine. I agree with the LORD JUSTICE in thinking that the appeal should be dismissed. The company having been formed in March, 1877, the advertisements complained of were inserted in the newspapers, and the circulars issued in the latter part of the month of June in the same year. The advertisement was in fact in the form of a caution: "The public, and in particular all farmers, graziers, dealers, and others, purchasing this world-famed food are warned that any food for cattle purporting to be 'Thorley's Food for Cattle' and not signed with the name of 'Joseph Thorley' is not the manufacture of the establishment carrying on the business as Joseph Thorley." Thus far no objection could be raised to it, but it goes on: "The proprietors of which are alone possessed of the secret for compounding that famous condiment and carry on business at Pembroke Wharf, Caledonian Road." In the circular, which was the second subject of complaint, is contained a warning to the effect that the company were seeking to foist upon the public an article which they pretended to be the same as that manufactured by the late Joseph Thorley. I do not think that the defendants were justified in issuing either of these documents.

In my opinion they had no right to state that they were alone possessed of the secret, nor had they a right to say that the plaintiffs in that action were seeking to foist upon the public an article which they pretended was the same as that manufactured by the late Joseph Thorley. It is unnecessary to go through the evidence in the case, but I feel bound to say that in my opinion the burden was on the defendants to show that there was a
 * difference, and I think something more than a mere [* 784] nominal difference, some substantial difference between the article made by the plaintiffs and the article made by the defendants. In my opinion, having very carefully gone through the several analyses in each case, there does not appear to be any substantial difference.

BRAMWELL, L. J. :—

I am of the same opinion, and have very little to add. I am satisfied that the two documents were libels. As to that one which uses the word "foist," it is needless to say anything, for it seems to be confessed on the part of the defendants, the executors, that it is a libel. I had some misgiving about the other one, because I doubted at first whether it was anything more than that sort of commendation of their own wares which may be considered allowable, but when we think of the old way of declaring for libel or defamation, and consider this advertisement in connection with the surrounding circumstances, namely, that the plaintiffs carried on the business of preparing food which they said they prepared according to a recipe which one Joseph Thorley had formerly used in his lifetime, it is manifest that this advertisement is a libel on the plaintiffs in their trade. It begins: "Caution," and it says, "The public, and in particular farmers, &c., are warned that any food for cattle not signed with the name of Joseph Thorley is not the manufacture of the establishment carrying on the business of Joseph Thorley, the proprietors of which are alone possessed of the secret of compounding that famous condiment." I am satisfied that this was a libel on the plaintiffs in the way of their trade, and calculated to do them injury, and consequently an action is maintainable with reference to the advertisement as well as with reference to the circular.

White v. Mellin.

1895 A. C. 154-172 (S. C. 64 L. J. Ch. 308; 72 L. T. 334; 43 W. R. 353).

Defamation. — Slander of Goods of a Rural Trader. — Injunction.

154¹ An action will not lie for a false statement disparaging a trader's goods where no special damage is proved.

Where an action will not lie for defamation, an injunction will not be granted.

The defendant sold the plaintiff's "Infants' Food," affixing to the plaintiff's wrappers a label stating that the defendant's "food for infants and invalids" was far more nutritious and healthful than any other. It was not proved that the statement was untrue or that it had caused any damage to the plaintiff: —

Held, reversing the decision of the Court of Appeal and restoring that of ROMER, J., that no action would lie, and that no injunction to restrain the defendant ought to be granted.

The respondent was the proprietor of Mellin's food for infants, which he sold in bottles enclosed in wrappers bearing the [* 155] words "Mellin's Infants' Food." The respondent was in the habit of supplying the appellant with these bottles, which the appellant sold again to the public after affixing on the respondent's wrappers a label as follows: —

" Notice.

" The public are recommended to try Dr. Vance's prepared food for infants and invalids, it being far more nutritious and healthful than any other preparation yet offered. Sold in barrels, each containing 1 lb. nett weight at 7½*d.* each, or in 7 lb. packets 3*s.* 9*d.* each. Local agent, Timothy White, chemist, Portsmouth."

The appellant was the proprietor of Vance's food. Discovering this practice, the respondent brought an action against the appellant, claiming an injunction to restrain him and damages.

At the trial before ROMER, J., the plaintiff proved the above facts, and called two analysts and a physician, the result of whose evidence is stated in Lord HERSCHELL's judgment. Briefly, they testified that in their opinion Mellin's food was suitable for infants, especially up to the age of six months, and persons who could not digest starchy matters, and that Vance's food was unsuitable for such beings, may pernicious and dangerous for very young infants. At the close of the plaintiff's case ROMER, J., being of opinion that the label was merely the puff of a rival trader and that no cause of action was disclosed, dismissed the action with costs. The Court of Appeal (LINDLEY, LOPES and

KAY, L. J.,) being of opinion that the cause ought to have been heard out, discharged that judgment and ordered a new trial, (1894) 3 Ch. 276, 63 L. J. Ch. 666.

Feb. 11, 12. Swinfen Eady, Q. C., and Charles Macnaghten for the appellant:—

To maintain an action for slander of goods the plaintiff must prove three things: (1) that the statement is disparaging to the plaintiff's goods; (2) that it is false; (3) that it has caused special damage to the plaintiff. None of these things were proved. The defendant's label was a mere trading puff and would be so regarded by the purchasing public. Even if *disparaging [*156] the statement was not false; whether one trader's goods are the best or better than another's is a matter of opinion, not of fact. Lastly, no special damage was proved to have happened or to be likely to happen. In *Evans v. Harlow*, 5 Q. B. 624, 13 L. J. Q. B. 120, there were express and strong words of disparagement of the plaintiff's goods, but as no special damage was alleged the declaration was held bad. In *Western Counties Manure Company v. Lawes Chemical Manure Company*, L. R., 9 Ex. 218, 43 L. J. Ex. 171, special damage was alleged and the declaration was held good. *Thomas v. Williams*, 14 Ch. D. 864, 49 L. J. Ch. 605, and *Ratcliffe v. Evans* (1892), 2 Q. B. 524, 61 L. J. Q. B. 535, are inapplicable. The former was a case of a man passing off his own goods as those of another, and the latter was, to use the words of BOWEN, L. J. (1892, 2 Q. B., at p. 527), "an action on the case for damage wilfully and intentionally done without just occasion or excuse." See also Comyn's Digest, Action upon the Case for Defamation, G. 11.

Moulton, Q. C., and A. & B. Terrell for the respondent:—

The defendant not having called witnesses the plaintiff's evidence was uncontradicted and must be taken to be true, namely, that the defendant's food was inferior to the plaintiff's for the purpose for which it was sold. The words which were manifestly disparaging were therefore shown to be false. It is not a case of damages, but of injunction, and if there is a reasonable probability of damage, even without actual damage, an injunction will be granted. The three necessary conditions which entitle a plaintiff to an injunction restraining a libel are, (1) that there is a statement unequivocally relating to the plaintiff or his goods; (2) the statement must be false; and (3) injurious, — that is

actually or probably productive of injury. To obtain an injunction it is not necessary to prove actual damage; it is enough to show that the words are calculated to injure the plaintiff's trade. *Thomas v. Williams*, 14 Ch. D. 864, 49 L. J. Ch. 605. Here the words were calculated to divert customers from the plaintiff to the defendant. All the necessary elements are present here. LINDLEY, L. J., rightly states the law: "If that statement has caused injury to or is calculated to injure the plaintiff this [* 157] *action will lie." An untrue statement though *bonâ fide* may be restrained by injunction. *Halsey v. Brotherhood*, 15 Ch. D. 514, 19 Ch. D. 386, 49 L. J. Ch. 786, 51 L. J. Ch. 233. *Bonnard v. Perryman* (1891), 2 Ch. 269, 60 L. J. Ch. 617, shows the jurisdiction of the Court to restrain the publication of a libel, and an injunction may be granted where no action for damages would lie.

[Lord HERSCHELL, L. C., referred to *Canham v. Jones*, 2 V. & B. 218 (13 R. R. 70).]

Swinfen Eady, Q. C., in reply referred to *Malachy v. Soper*, 3 Bing. N. C. 371, 6 L. J. C. P. 32, as to the necessity for special damage, where (as here) the words were written not of the plaintiff in the way of his trade, but of the goods he traded in.

The House took time for consideration.

Feb. 14. Lord HERSCHELL, L. C. (after stating the facts):—

My Lords, in the Court of Appeal LINDLEY, L. J., stated the law thus: "If upon hearing the whole of the evidence to be adduced before him the result should be that the statement contained in the label complained of is a false statement about the plaintiff's goods to the disparagement of them, and if that statement has caused injury to or is calculated to injure the plaintiff, this action will lie." LOPES, L. J., said: "All I desire to say is that, in my opinion, it is actionable to publish maliciously without lawful occasion a false statement disparaging the goods of another person and causing such other person damage, or likely to cause such other person damage."

None of the learned Judges in the Court of Appeal dealt with the evidence which had been adduced on behalf of the plaintiff; but I think it must be taken that they had arrived at the conclusion that that evidence did bring the case within those statements of the law. Of course, if the plaintiff, on his evidence, had made out no case, he could not complain that the learned Judge decided

against him and did not hear the witnesses for the defendant; the action was in that case properly dismissed. I take it, therefore, that although the learned Judges did not analyse the evidence or make any reference to it, they must have *con- [* 158] cluded that it established a case coming within the law as they laid it down. My Lords, as I understand, in the view of those learned Judges, or in the view of LINDLEY, L. J., to take his statement of the law in the first place, it was necessary in order to the maintenance of the action that three things should be proved: that the defendant had disparaged the plaintiff's goods, that such disparagement was false, and that damage had resulted or was likely to result. Now, my Lords, the only statement made by the defendant by means of the advertisement is this: that Vance's food was the most healthful and nutritious for infants and invalids that had been offered to the public. The statement was perfectly general, and would apply in its terms not only to the respondent's infants' food but to all others that were offered to the public. I will take it as sufficiently pointed at the plaintiff's food by reason of its being affixed to a bottle of the plaintiff's food when sold, and that it does disparage the plaintiff's goods by asserting that they are not as healthful and as nutritious as those recommended by the defendant. The question then arises, Has it been proved on the plaintiff's own evidence that that was a false disparagement of the plaintiff's goods?

I will state what I understand to be the result of the plaintiff's evidence. Mellin's food for infants and invalids is a preparation of such a nature that the food is said to be pre-digested, and therefore not to make that call upon the digestion which food ordinarily does; that as regards children under six months of age Mellin's food is the only one which could be suitably used in the place of the ordinary means of nourishment, the mother's milk, and that any farinaceous food would at that age be not only not nutritious but prejudicial. And so far, accepting the plaintiff's evidence for this purpose, there being no evidence to the contrary, the plaintiff, I think, establishes that his food was specially meritorious for that class of cases, and that it would not be correct to say that as regards these children of very tender age Vance's food or any other farinaceous food would be not only more healthful and nutritious, but as healthful and nutritious. But then it appears that when a child has passed the age up to which nutri-

[* 159] tion at the breast may ordinarily be *said to continue, the use of some farinaceous food is not only not prejudicial but desirable, and that if the child were to be always brought up upon a food which would be suitable during the very earliest weeks or months, its digestion would be likely to suffer rather than benefit, and there would be not more, but less nourishment. After twelve months, as I understand the evidence, the farinaceous food would be distinctly better for the purposes of nutrition and health than this pre-digested food. That, my Lords, I take to be a fair statement of the result of the evidence. Can it be said, under those circumstances, that it is a false disparagement of the plaintiff's goods to say that this other preparation — Vance's — is more nutritious and healthful for infants and invalids? I put aside the question of invalids: upon that there was no evidence at all. The plaintiff did not say that his was more healthful, or that the defendant's was not more healthful. It is therefore unnecessary to consider the case of invalids, and it is enough to confine one's attention to the case of infants.

The word "infants" is not in ordinary parlance confined to children of very tender age. If one looks at its derivation etymologically it would apply to children so long as they are not able to articulate distinctly — not able to speak — and nobody would hesitate to refer to children, I should say, at least under two years of age as infants, just as much as they would to children under six months of age. Therefore, if you look at the class of infants as a whole, it is by no means shown that the statement that Vance's food is more nutritious and healthful than the plaintiff's food is false. If the reference had been specially to that very early period of life during which Mellin's food would be beneficial and the other prejudicial, no doubt a statement of that description might well be said to be a false statement; but looking fairly at the language used and the meaning to be attributed to it, I am not satisfied that it has been shown that by means of this advertisement the defendant falsely disparaged the plaintiff's goods. But, my Lords, assuming that he did so, the Court of Appeal regarded it as requisite for the maintenance of the action that something further should be proved, and that is that [* 160] the disparaging statement has caused *injury to or is calculated to injure the plaintiff. Upon that there is a complete absence of evidence. The plaintiff was called, but he did

not state that he had sustained any injury, nor did he even say that it was calculated to injure him, and I own it seems to me impossible, in the absence of any such statement or evidence, to say that it is a case in which such must be the necessary consequence; on the contrary, speaking for myself, I should doubt very much whether it was likely to be the consequence. After all, the advertisement is of a very common description, puffing, it may be, extremely and in an exaggerated fashion, these particular goods, Vance's food. That advertisement was outside the wrapper; inside was found an advertisement of Mellin's food, in which Mellin's food was stated to be recommended by the faculty as best for infants and invalids. Why is it to be supposed that any one buying this bottle at the chemist's would be led to believe that Mellin's food which he had bought was not a good article or not as good an article as another, merely because a person who obviously was seeking to push a rival article said that his article was better? My Lords, why should people give such a special weight to this anonymous puff of Vance's food, obviously the work of some one who wanted to sell it, as that it should lead him to determine to buy it instead of Mellin's food, which was said to be recommended by the faculty as the best for infants and invalids? I confess I do not wonder that the plaintiff did not insist that he had sustained injury by what the defendant had done. There is an entire absence of any evidence that the statement complained of either had injured or was calculated to injure the plaintiff. If so, then the case is not brought even within the definition of the law which LINDLEY, L. J., gives.

LOPES, L. J., adds the word "maliciously," that "it is actionable to publish maliciously without lawful occasion a false statement disparaging the goods of another person." By that it may be intended to indicate that the object of the publication must be to injure another person, and that the advertisement is not published *bonâ fide* merely to sell the advertiser's own goods, or at all events, that he published it with a knowledge of its falsity. One or other of those elements, it seems to me, must be intended

*by the addition of the word "maliciously." Both those [*161] are certainly absent here. There is nothing to show that the object of the defendant was other than to puff his own goods and so sell them, nor is there anything to show that he did not believe that his food was better than any other.

The only case which the learned counsel for the respondent was able to rely upon, as at all approaching the present, is the case of the *Western Counties Manure Company v. Lawes Chemical Manure Company*, L. R., 9 Ex. 218, 43 L. J. Ex. 171, in which case a declaration was held good which alleged the disparagement of the plaintiff's goods by stating that they were inferior to those sold by the defendants. In that case special damage was alleged in the declaration, and I think that that allegation was regarded by both the learned Judges who were parties to the decision as material and essential. In the earlier case of *Evans v. Harlow*, 5 Q. B. 624, 13 L. J. Q. B. 120, a statement was complained of which distinctly disparaged the plaintiff's goods. It cautioned the public against them, it pointed out to the public that they were not likely to realize the purpose for which they were designed, and the allegation was that "the defendant published a libel of and concerning the plaintiff and of and concerning him in his said trade and of and concerning his design as follows." In that case there was no allegation of special damage; there was a demurrer to the declaration, and the declaration was held bad. Now, the only distinction that I can see between that case and the case of the *Western Counties Manure Company v. Lawes Chemical Manure Company* is that in the latter case special damage was alleged, whereas in the former it was not. BRAMWELL, B., does not call specific attention to the *differentia* between the case before him and the case of *Evans v. Harlow*, but he says that there is nothing in any of the cases inconsistent with the judgment which he is pronouncing. POLLOCK, B., who was the other Judge, pointed out that in *Evans v. Harlow* there was no allegation of special damage. Therefore, my Lords, the utmost that the *Western Counties Manure Company v. Lawes Chemical Manure Company* can be claimed as an authority for is this, that an action will lie for falsely [* 162] disparaging another's goods where special damage* results.

Evans v. Harlow is a distinct authority that it will not lie where special damage does not result. In the present case it cannot be pretended that any special damage was either alleged or proved.

Mr. Moulton sought to extricate himself from that difficulty in this way: he said that if this were an action for damages that might be a well-founded objection to it, but that it is not an action for damages but a claim for an injunction, and that although it may be that to support an action for damages it would be neces-

sary to allege and prove special damage, that is not necessary where an injunction is claimed, — that it is enough if a false statement is made and is likely to be repeated.

Now, my Lords, no authority was cited to show that a Court of Equity under any of the branches of its jurisdiction had ever granted or would grant an injunction in such a case. Certainly there is no rule of equity under which it may be said generally that a Court of Equity would restrain every publication of a false statement. In the case of *Canham v. Jones*, 2 V. & B. 218 (13 R. R. 70), the bill stated that a certain Mr. Swainson had been the sole proprietor of a secret for preparing the medicine called "Velno's Vegetable Syrup," and that the plaintiff had obtained title to it under his will and had sold the medicine. Then the complaint was that the defendant, who had been a servant of Swainson, was employed in the preparation of the syrup, but was not acquainted with the complete preparation, certain essential ingredients being introduced by only Swainson himself and only in the presence of the plaintiff. Then it alleged "that the defendant being discharged from his service had made and advertised for sale a spurious preparation under the name of Velno's Vegetable Syrup, stated by him to be the same medicine in composition and quality as that made by Swainson and the plaintiff, the defendant's advertisement certifying that the medicine prepared by him at his residence under the name of Velno's Vegetable Syrup is precisely the same with that made and sold by the late Mr. Swainson." It was alleged that that was untrue, and that it was a spurious preparation pretending to be the same when it really was not. To that bill the defendant put in a general demurrer* for want of equity. That demurrer was [*163] sustained by the Vice-Chancellor, Sir THOMAS PLUMER, although for the purposes of that demurrer it was taken that the defendant selling this article was falsely stating that it was the same as the plaintiff's.

My Lords, the learned counsel relied upon recent cases in which an injunction has been granted to restrain the publication of a libel, and he suggested that there had been a growth of equity jurisprudence which had brought within its ambit a class of cases which were previously not regarded as within it. But when the case in which the Court of Appeal laid down that an injunction might be granted to restrain the publication of a libel is looked

No. 13. — *White v. Mellin*, 1895, A. C. 163, 164.

at, it will be seen that the decision was not founded upon any principle or rule of equity jurisprudence, but upon the fact that a Court of Common Law could have granted such an injunction in an action of libel, and that since the Judicature Act the power which a Court of Common Law possessed in that respect is now possessed also by the Court of Chancery. That was distinctly the ground upon which the judgment was founded, that "the 79th and 82nd sections of the Common Law Procedure Act, 1854, undoubtedly conferred on the Courts of Common Law the power, if a fit case should arise, to grant injunctions at any stage of a cause in all personal actions of contract or tort, with no limitation as to defamation;" and then, inasmuch as those powers are now possessed by the Chancery Division, it was held that they likewise could in such cases grant an injunction. That was the decision in *Bonnard v. Perryman* (1891), 2 Ch. 269, 60 L. J. Ch. 617.

My Lords, obviously to call for the exercise of that power it would be necessary to show that there was an actionable wrong well laid, and if the statement only showed a part of that which was necessary to make up a case of action — that is to say, if special damage was necessary to the maintenance of the action, and that special damage was not shown — a tort, in the eye of the law, would not be disclosed, the case would not be within those provisions, and no injunction would be granted. I think, therefore, for these reasons, that the plaintiff would not be entitled to an injunction, any more than he would be entitled [* 164] * to maintain an action unless he established all that was necessary to make out that a tort had been committed; and for the reasons which I have given, taking the *Western Counties Manure Company v. Lawrence Chemical Manure Company* to be good law, he has not brought himself within it.

But, my Lords, I cannot help saying that I entertain very grave doubts whether any action could be maintained for an alleged disparagement of another's goods, merely on the allegation that the goods sold by the party who is alleged to have disparaged his competitors' goods are better either generally or in this or that particular respect than his competitors' are. Of course, I put aside the question (it is not necessary to consider it) whether where a person intending to injure another, and not in the exercise of his own trade and vaunting his own goods, has maliciously and falsely disparaged the goods of another, an action will lie; I am dealing

with the class of cases which is now before us, where the only disparagement consists in vaunting the superiority of the defendant's own goods. In *Evans v. Harlow*, Lord DENMAN expresses himself thus: "The gist of the complaint is the defendant's telling the world that the lubricators sold by the plaintiff were not good for their purpose, but wasted the tallow. A tradesman offering goods for sale exposes himself to observations of this kind, and it is not by averring them to be 'false, scandalous, malicious, and defamatory,' that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action." My Lords, those observations seem to me to be replete with good sense. It is to be observed that *Evans v. Harlow* does not appear to have been decided on the ground merely that there was no allegation of special damage. The only Judge who alludes to the absence of such an allegation is PATTESON, J. No reference to it is to be found either in the judgment of Lord DENMAN or in the judgment of WIGHTMAN, J., the other two Judges who took part in that decision; and I think it is impossible not to see that, as Lord DENMAN says, a very wide door indeed would be opened to *litigation, and that the Courts might be constantly [*165] employed in trying the relative merits of rival productions, if an action of this kind were allowed.

Mr. Moulton sought to distinguish the present case by saying that all that Lord DENMAN referred to was one tradesman saying that his goods were better than his rival's. That, he said, is a matter of opinion, but whether they are more healthful and more nutritious is a question of fact. My Lords, I do not think it is possible to draw such a distinction. The allegation of a tradesman that his goods are better than his neighbour's very often involves only the consideration whether they possess one or two qualities superior to the other. Of course "better" means better as regards the purpose for which they are intended, and the question of better or worse in many cases depends simply upon one or two or three issues of fact. If an action will not lie because a man says that his goods are better than his neighbour's, it seems to me impossible to say that it will lie because he says that they are better in this or that or the other respect. Just consider what a door would be opened if this were permitted. That this sort of

No. 13. — *White v. Mellin*, 1895, A. C. 165. 166.

puffing advertisement is in use is notorious; and we see rival cures advertised for particular ailments. The Court would then be bound to inquire, in an action brought, whether this ointment or this pill better cured the disease which it was alleged to cure, — whether a particular article of food was in this respect or that better than another. Indeed, the Courts of Law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better. As I said, advertisements and announcements of that description have been common enough; but the case of *Evans v. Harlow* was decided in the year 1844, somewhat over half a century ago, and the fact that no such action — unless it be *Western Counties Manure Co. v. Lawes Chemical Manure Co.* — has ever been maintained in the Courts of Justice is very strong indeed to show that it is not maintainable. It is, indeed, unnecessary to decide the point in order to dispose of the present appeal.

For the reasons which I have given I have come to the [*166] *conclusion that the judgment of the Court below cannot

be sustained, even assuming the law to be as stated by the learned Judges; but inasmuch as the case is one of great importance and some additional colour would be lent to the idea that an action of this description was maintainable by the observations in the Court below, I have thought it only right to express my grave doubts whether any such action could be maintained even if the facts brought the case within the law there laid down.

Upon the whole, therefore, I think that the judgment of ROMER, J., was right and ought to be restored, and that this appeal should be allowed, with the usual result as to costs; and I so move your Lordships.

LORD WATSON: —

My Lords, the ground of this action is slander, not of the plaintiff himself, in his personal or business capacity, but of an article of food which he manufactures and sells as “Mellin’s Infants’ Food.” The defendant, who is a chemist, sells the plaintiff’s food at his establishments in Portsmouth and its neighbourhood. He also sells another food, in which he has a proprietary interest, which is known as “Dr. Vance’s Prepared Food for Infants or Invalids.”

The alleged slander is contained in a label, notice, or advertisement used by the defendant, by which “The public are recommended to try Dr. Vance’s Prepared Food for Infants or Invalids,

it being far more nutritious and healthful than any preparation yet offered." In his statement of claim, the plaintiff avers that the defendant was in the habit of affixing that label to the wrappers in which "Mellin's Infants' Food" is made up for sale. The defendant admits that he affixed the label to various articles sold by him, and in some cases to the wrappers in which the plaintiff's food is sold, care being always taken that the printed or written matter on the wrappers should not be interfered with or rendered illegible. Beyond that admission there is no evidence bearing on the point.

The wrong complained of being the slander of goods, the fact that the representations made by the defendant in the label already referred to might be calculated to disparage the food *manufactured by the plaintiff and to interfere with its [*167] sale can afford no cause of action. Every extravagant phrase used by a tradesman in commendation of his own goods may be an implied disparagement of the goods of all others in the same trade; it may attract customers to him and diminish the business of others who sell as good and even better articles at the same price; but that is a disparagement of which the law takes no cognizance. In order to constitute disparagement which is, in the sense of law, injurious, it must be shown that the defendant's representations were made of and concerning the plaintiff's goods; that they were in disparagement of his goods and untrue; and that they have occasioned special damage to the plaintiff. Unless each and all of these three things be established, it must be held that the defendant has acted within his rights and that the plaintiff has not suffered any legal *injuria*.

It is true that in the present case the plaintiff, who does not aver that he has sustained any special damage, only claims an injunction. That circumstance cannot make any difference in his favour. Damages and injunction are merely two different forms of remedy against the same wrong; and the facts which must be proved in order to entitle a plaintiff to the first of these remedies are equally necessary in the case of the second. The onus resting upon a plaintiff who asks an injunction, and does not say that he has as yet suffered any special damage, is, if anything, the heavier, because it is incumbent upon him to satisfy the Court that such damage will necessarily be occasioned to him in the future.

Having examined the plaintiff's evidence, and having also heard all that could possibly be said for it from Mr. Moulton, I must confess my inability to appreciate the reasons which induced the learned Judges of the Appeal Court to disapprove of the course which had been taken by ROMER, J. It is not suggested that the plaintiff had not ample opportunity of leading all the proof which he desired. The evidence which he did adduce appears to me to fail upon every point which was essentially necessary to his success in the action.

In the first place, I do not think the representation conveyed by the defendant's label is, in any legal sense, a representation [*168] of and concerning the infants' food of the plaintiff.

It is a highly coloured laudation of Dr. Vance's food and nothing else. It makes no reference to the plaintiff's goods beyond what might be implied in the case of every other kind of food which is recommended and sold as being suitable for consumption by infant children. Nor, in my opinion, is the circumstance that the label was sometimes put upon the plaintiff's wrappers, however distressing it might be to him, sufficient to convert it into a disparagement of the contents of the wrapper. An advertisement in the window of a bootmaker, to the effect that he makes the best boots in the world, may be more offensive to his next neighbour in the same trade than to a bootmaker at a distance; but the disparagement in kind and degree is identical in both cases.

In the second place, assuming that the representation did refer to the plaintiff's food, I am of opinion that his evidence does not prove it to be untrue. At the best, the evidence comes to no more than this, that the plaintiff's food is the more suitable for children under six months old who cannot get their mother's milk; and that Dr. Vance's food is the more suitable for children above that age who are not the victims of indigestion. In these circumstances it appears to me to be difficult to hold that it was not open to either of the parties to say that his was the best food for infants without conveying a false imputation upon the food of the other.

In the third and last place, I am of opinion that, even if the plaintiff had proved that the representation concerned his food and was wilfully false, his evidence discloses no cause of action. There is not in the whole of it an attempt to prove that the plain-

tiff has suffered in the past or is likely to suffer in the future any damage whatever through the representations of which he complains.

I therefore agree that the order of the Court of Appeal ought to be reversed, and the judgment of ROMER, J., restored.

Lord MACNAGHTEN: —

My Lords, I entirely agree.

Upon the legal aspect of the case I have nothing to add. I *only wish to protest against it being supposed that [*169] there is any shadow of foundation in equity for the present claim. I mean no imputation upon the draftsman, because the claim as originally launched was founded on an implied contract arising out of the custom of trade. And if that could have been made out the respondent would have had something to say.

Mr. Moulton in his ingenious argument endeavoured to rest his case on some ground which was neither law nor equity, but something between the two. It was, he argued, a legitimate development of equitable principles now that a Court of Equity is free to deal with legal rights.

A reference to a case in the Court of Appeal when Lord CAIRNS sat there as Chancellor with JAMES and MELLISH, L.JJ., will suffice, I think, to dispel that notion. A gentleman of the name of Knott had published a pamphlet about insurance companies. He had collected a large body of statistics, and with the light thus afforded he compared the relative stability of different offices. One office thought the comparison particularly odious and applied for an injunction. The application was refused by HALL, V.-C. There was an appeal from his decision. The case of the appellants was mainly rested on the judgment of MALINS, V.-C., in *Dixon v. Holden*, L. R., 7 Eq. 488. Lord CAIRNS, L. C., in his judgment quoted two passages from the VICE-CHANCELLOR'S judgment in *Dixon v. Holden*. One of them was in these words: " 'In the decision I arrive at,' said the VICE-CHANCELLOR " (Malins) " 'I beg to be understood as laying down that this Court has jurisdiction to prevent the publication of any letter, advertisement or other document, which if permitted to go on would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation.' " The LORD CHANCELLOR'S comment was this: "I am unable to accede to these general propositions. They

appear to me to be at variance with the settled practice and principles of this Court.” *Prudential Assurance Company v. Knott*, L. R., 10 Ch. 142, 44 L. J. Ch. 192.

I think ROMER, J., was quite right in the view which he took, and that he acted properly in dismissing the action at the [*170] close * of the plaintiff’s case. I concur in the motion proposed by the LORD CHANCELLOR.

Lord MORRIS:—

My Lords, I also concur. If the averment in the statement of claim that there is an implied condition in the trade as therein set forth¹ be now struck out, as it is admitted it must be, because there was no proof of it at the trial, in my opinion the statement of claim discloses no cause of action at all. It contains no averment of the act complained of being done maliciously, nor does it allege any special damage; not that I think, even if it did, any cause of action would be established on the evidence, because the only reflection of the defendant upon the plaintiff’s article was that his, the defendant’s, was more healthful and nutritious. Such a statement *simpliciter*, in my opinion, conveys no right of action to the plaintiff. A party does not lay himself open to an action who *bonâ fide* praises his goods as better than another’s, and it cannot give a cause of action because on the trial of those competing articles the defendant’s article may be ascertained not to be better than the plaintiff’s.

But it was said that although an action for damages could not be sustained, an injunction in equity could be obtained. It would certainly be a strange and novel chapter of equity if a party could get a perpetual injunction to restrain an act which is not an illegal act.

Lord SHAND:—

My Lords, I also concur in the judgment which the LORD CHANCELLOR proposes, and in the reasons in support of it which have been stated by your Lordships. I only desire to add that for my part I should be quite content with the ground [*171] of * judgment which ROMER, J., expressed in dismissing

¹ The condition was alleged in the statement of claim as follows:—

“The said food is sold wholesale by the plaintiff, and it is a well-understood condition in the trade of such sale that the said food shall be sold by the retail

sellers in identically the same form as to wrappers and labels as that in which it is supplied, and without any additions or alterations thereto or thereof except that the retailer may affix a label with his own name and address thereon.”

the case after the evidence of the plaintiff had been led. The learned Judge then said: "No doubt, on the evidence on the plaintiff's side, so far as that goes, it does tend to show that his food is the best, at any rate for infants under six months old;" and he goes on to say: "But, as I have said, no person on seeing what the defendant has done would have read this statement put upon the plaintiff's cases as being anything more than a rival puff. Of course it is always very annoying to a man who has a good article to find a person who is putting a rival article stating that the rival article is really the best, and it is still more annoying to find that statement put upon the goods of the man who complains. But, however annoying the form of the advertisement of the defendant may be to the plaintiff, I come to the conclusion that what has been done by the defendant has not amounted in any true sense to a trade libel as against the plaintiff, and that the plaintiff has no legal remedy in respect of it." It appears to me that in order to constitute a libel of the class here complained of there must be a statement in disparagement of the plaintiff's goods, and that the statement must be false and injurious. But, then, I do not think that disparagement in a popular sense would be enough for the plaintiff's case. It is a disparagement of one man's goods to say that they are inferior to the goods of another; but such a statement cannot, I think, be the ground of a claim of damages or a claim for injunction such as the plaintiff here asked. If there had been in this case an imputation of intentional misrepresentation for the purpose of misleading purchasers, or a statement that Mellin's food was positively injurious, or that it contained deleterious ingredients, and would be hurtful if it were used, I think there would have been a good ground of action; and if the authorities have not settled the law otherwise, I should even say that an averment of special damage ought not to be necessary. But when all that is done is making a comparison between the plaintiff's goods and the goods of the person issuing the advertisement, and the statement made is that the plaintiff's goods are inferior in quality or inferior, it may be, in some special qualities, I think this cannot be regarded as a disparagement of which the law will take cognizance.

*I fully concur in the views stated at the close of the [*172] LORD CHANCELLOR'S opinion with this addition, that as far as my mind is concerned I do not feel merely the doubt that his

Nos. 12, 13. — *Thorley's Cattle Food Co. v. Massam*; *White v. Mellin*. — Notes.

Lordship expressed, because I think in point of law in the various cases to which his Lordship referred as illustrations an action would not lie. That view is supported by the reasons given in the judgment of Lord DENMAN in the case of *Erans v. Harlow*, 5 Q. B. 624, 13 L. J. Q. B. 120, which I regard as the leading authority applicable to cases of this class.

Therefore, upon the simple ground that the advertisement complained of, though clearly it applied to the plaintiff's goods, really cannot be characterized as a libel, I am of opinion that the action was rightly dismissed by the learned Judge before whom it was tried.

Lord HERSCHELL, L. C. :—

My Lords, my noble and learned friend Lord ASHBOURNE, who is unable to be present to-day, has asked me to say that he entirely concurs in the judgment proposed.

Order of the Court of Appeal reversed; Judgment of Romer, J., restored, with costs here and in the Court of Appeal; Cause remitted to the Chancery Division.

Lords' Journals, 14th Feb. 1895.

ENGLISH NOTES.

In *Ratcliffe v. Erans* (C. A. 1892), 1892, 2 Q. B. 524, 61 L. J. Q. B. 535, 66 L. T. 794, 40 W. R. 578, the Court (1892, 2 Q. B. at p. 527) explained the nature of such actions in the following words: "Such an action is not one of libel or slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to action for slander of title. To support it, actual damage must be shown, for it is an action which only lies in respect of such damage as has actually occurred." Later on (at p. 533), it was said: "In an action for falsehood producing damage to a man's trade which in its very nature is intended or reasonably likely to produce, and which in the ordinary course of things does produce a general loss of business, as distinct from the loss of this or that customer, evidence of such general decline of business is admissible. In *Hargrave v. Le Breton* (No. 11, p. 169, *post*), 4 Burr. 2422, it was a falsehood openly promulgated at an auction. In the case before us to-day, it is a falsehood openly disseminated through the press — probably read, and possibly acted on, by persons of whom the plaintiff never heard. To refuse, with reference to such a subject-matter, to admit such general evidence would be to misunderstand and warp the meaning of old expressions; to depart from, and not to follow old rules; and in addition

to all this, it would involve an absolute denial of justice and of redress, for the very mischief which was intended to be committed."

In *Trollope v. London Building Trade Federation* (Ch. & C. A., 8 Feb., 6 March, 1895), 72 L. T. 342, 11 Times L. R. 228, 280, a poster, headed "A Black List," gave the names of non-union men whom A. employed. KEKEWICH, J., granted an interlocutory injunction to restrain the continuance of the publication; on the ground that the motive was to injure A. and his men, and that the injury was being inflicted from day to day. The Court of Appeal affirmed the order, on the ground that a *prima facie* case had been made out that the defendants had acted injuriously.

AMERICAN NOTES.

This Rule is sustained by *Wilson v. Dubois*, 35 Minnesota, 471 (race-horse); *Boydton v. Shaw Stocking Co.*, 116 Massachusetts, 219; *Tobias v. Harland*, 4 Wendell (New York), 537; *Dooling v. Budget Pub. Co.*, 144 Massachusetts, 258; *Paull v. Halferty*, 63 Pennsylvania State, 46, to the effect that mere disparagement of goods, without proof of falsity and special damage, is not actionable. In the *Dooling case*, *supra*, the words alleged were: "Probably never in the history of the Ancient and Honourable Artillery Company was a more unsatisfactory dinner served than that of Monday last. One would suppose from the elaborate bill of fare that an elaborate dinner would be furnished by the caterer Dooling, but instead a wretched dinner was served, and in such a way that even a hungry barbarian might reasonably object. The cigars were simply vile and the wines not much better." The Court held that "words relating merely to the quality of articles made, furnished, or sold by a person, though false and malicious, are not actionable without special damage." See *Snow v. Judson*, 38 Barbour (New York), 210; *Blumhardt v. Rohr*, to appear in Maryland —; *Hamilton v. Walters*, 4 Up. Can. Q. B., 21 (O. S.).

The *Thorley case* is cited in Newell on Defamation, p. 223, and in Townsend on Slander and Libel, p. 692.

The same was conceded in *Gott v. Pulsifer*, 122 Massachusetts, 235; 23 Am. Rep. 322. This was an action for disparaging the "Cardiff Giant," a pretended ossified human being of great antiquity, dug up in the State of New York, but which turned out to be a manufacture. The special damage alleged was the loss of sale, and therefore the exclusion of evidence of its value as a scientific curiosity or for purposes of exhibition was approved. It was said that proof of actual malice was not necessary. GRAY, C. J., observed: "But in order to constitute such malice, it is not necessary that there should be direct proof of an intention to injure the value of the property; such an intention may be inferred by the jury from false statements, exceeding the limits of fair and reasonable criticism, and recklessly uttered in disregard of the right of those who might be affected by them." (Citing ENLÉ, C. J., in *Hibbs v. Wilkinson*, 1 F. & F. 608, 610; COCKBURN, C. J., in *Morrison v. Belcher*, 3 F. & F. 614, 620.) "The only definition of malice, given by the learned Judge who presided at the trial, was therefore erroneous, because it required the

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plaintiff to prove 'a disposition wilfully and purposely to injure the value of this statue,' as well as 'wanton disregard of the interest of the owners.' The jury, upon the evidence before them, and under the instructions given them, may have been of opinion that the defendants' statements that the plaintiff's statue was an 'ingenious humbug,' 'a sell,' and 'a fraud,' were false, reckless, and unjustifiable, and had the effect of injuring the plaintiff's property, and caused him special damage; and may have returned their verdict for the defendants solely because they were not convinced that they intended such injury."

To charge a person with selling milk rendered impure by reason of his allowing a diseased horse to run in the pasture with the cows, is libellous. *Brooks v. Harrison*, 91 New York, 83.

In *Swan v. Tappan*, 5 Cushing (Massachusetts), 104, it was held that no action lies for a publication disparaging an author's copyrighted works, without allegation and proof of special damage. Citing *Tobias v. Harland*, 4 Wendell (New York), 537; *Ingram v. Larson*, 6 Bing. N. C. 212. The Court also seems to imply that the action would be maintainable by proof of falsity and special damage, — "that will make a *prima facie* case for the plaintiff, and as standing thus malice would be presumed."

Mr. Townshend says (Slander and Libel, sect. 204): "Language concerning a thing is actionable when published maliciously, *i. e.*, without lawful excuse, if it occasions damage to the owner of the thing." Citing some English cases, he continues, in a note: "The foregoing cases seem to imply that the fact of loss or special damage, as it is termed, will alone render actionable language concerning a thing; we state it otherwise in the text, and we suppose it to be otherwise."

Mr. Newell expresses the rule thus: "False and malicious statements disparaging an article of property, when followed as a natural, reasonable, and proximate result by special damage to the owner, are actionable." (Defamation, p. 216.) Citing the *Manure Co.'s case*, L. R., 9 Ex. 218, to the point that proof of actual malice is not essential.

SECTION VIII. — *Slander of Title.*

No. 14. — HARGRAVE v. LE BRETON.

(K. B. 1769.)

No. 15. — SMITH v. SPOONER.

(C. P. 1810.)

RULE.

AN action at common law for slander of title cannot be maintained without proof of malice. A *bonâ fide* claim of title will, in general, rebut any implication of malice.

No. 14. — **Hargrave v. Le Breton**, 4 Burr. 2422, 2423.

Hargrave v. Le Breton.

4 Burr. 2422-2426.

Defamation. — Slander of Title. — Malice.

There must be malice, either expressed or implied, to maintain an [2422] action for slander of title.

This action was called by the counsel for the defendant an action of slander of the plaintiff's title: but the plaintiff's counsel said it was an action upon the case, for a real injury sustained by him.

It had been tried before Lord MANSFIELD at Guildhall; and a verdict given for the plaintiff, with £50 damages: but the defendant had moved to set it aside, and to have a new trial. It was argued upon Tuesday, April 25th, 1769; and again, upon Saturday the 29th: and this day, Lord MANSFIELD delivered the opinion of the Court.

The general substance of the case was, That the premises (which were of the value of about £1200 and originally belonged to one John Loveday, but had been mortgaged by him to the plaintiff Hargrave, who had also got in a prior assignment of them) were upon sale by auction, for the benefit of the parties respectively interested, and by their joint * agreement. The [* 2423] auction was actually begun; and some persons had bid: but at the first beginning of the bidding, and before it had proceeded to any considerable degree of advancement, the defendant Mr. Le Breton, who was concerned as attorney for one Mr. Lee, a creditor of John Loveday the original owner and mortgagor, came into the room in a great hurry; and said to the company "that he had bad news to tell them." Being asked "What news?" he answered, that he was sent by a creditor of Mr. John Loveday's, to acquaint them "that the said John Loveday was a bankrupt before he made a mortgage to the plaintiff; and that there was a docket made out for a commission against him; and that his name would be in the Gazette on the Saturday evening following." Whereupon, the bidding immediately ceased; and the estate remained unsold, and does still remain so. What the defendant thus declared was partly true, and partly otherwise. It was true, "that he was really sent by his client Mr. Lee, who was a creditor of Loveday's, on purpose to make this public declaration at the auction, of Loveday's

being a bankrupt before he made the mortgage to the plaintiff; and that Mr. Lee intended to take out a commission against him." But it was not true in fact, nor did Mr. Lee, his client, give him any authority to say, "that there was a docket made out for a commission against him," nor "that his name would be in the Gazette on the Saturday evening following;" neither is there yet any docket or commission, nor has his name yet been in the Gazette. However, no actual malice was either alleged or proved. But the counsel for the plaintiff inferred malice, from his false assertion, which was merely his own, without any authority from his client; and which (they said) he could not but know to be false, as he was himself Mr. Lee's attorney, and the person to be employed in suing out the commission of bankruptcy, if it had been sued out at all. It appeared, upon the evidence, that one Bolland had recommended Le Breton to Lee (Loveday's creditor) to take out a commission of bankruptcy against Loveday who in fact was then become bankrupt; and that Lee did send Le Breton to this auction, to declare "that he would petition, and make him a bankrupt that night." Le Breton was not at all known to any of the parties; nor had he any knowledge of these affairs, other than the information he received from his client Lee. The fact of Loveday's having committed an act of bankruptcy before he made the mortgage to Hargrave was fully proved by Bolland; and it appeared that Lee had notice of it from Bolland.

The counsel for the defendant offered an objection which did not go to the merits; and was easily answered. They said, [*2424] the action was founded on special damages; and *therefore the names of those persons who would otherwise have been purchasers, but went off from it upon the speaking of these words, ought to have been specified; whereas this declaration only charges thus: "Whereby divers persons who would have purchased, &c.," without naming any one who went off from treating about the purchase.

The answer was, That in the nature of this transaction it was impossible to specify names. The injury complained of is, that the bidding was thereby prevented and stopped. No one can tell who would have bid, and who would not. The auction ceased; and everybody went away. It could not be known who would have been bidders or purchasers, if it had not been thus put an end to.

The main question was: Whether the defendant was justifiable

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in having spoken these words upon this occasion, as a messenger from and agent for the creditor of Loveday; not having confined himself to the message he was authorized by his client to deliver, and the declaration he was sent to make on his client's behalf; but having added to it, of his own head, other assertions which were not true in fact, nor given him in charge by his client. For, supposing him to be excusable in executing his commission, as Mr. Lee's attorney or agent, yet he had exceeded the bounds of it, as well as the strict truth: which was urged by the plaintiff's counsel, to imply malice in the defendant himself personally.

The Court seemed, upon the two first mentioned days, to have no doubt but that Mr. Le Breton, who acted as agent for the creditor, would have been excusable, if he had only delivered his client's message; and that if the creditor had been himself present and had spoken the words of his own message, he would not have been liable to an action for giving a notice necessary to be given, in order to prevent a purchaser's title from being good against him for want of notice; and that malice should not be implied, where the words spoken are true, and the speaker claims title. But whether Mr. Le Breton was excusable for what he voluntarily added, beyond the limits of his commission, they took a few days to consider.

Lord MANSFIELD now declared the result of their consideration.

The question is, "Whether, upon the evidence, the plaintiff ought to recover against the defendant, upon the circumstances of this case."

* It is to be considered, in point of law, first, "Whether [* 2425] this action would have lain against Le Breton, the attorney for the creditor, if he had only delivered the message in his client's own words;" and secondly, "Whether the variation he made from them will subject him to this action."

As to the first — we are all clear "that it would not." He is no more liable to the action than the creditor himself would have been. He was sent by Lee to make this declaration; and *qui facit per alium, facit per se*. But the plaintiff could not have recovered against Lee: for, to maintain such an action as this is, there must be malice, either express or implied; and the words spoken must go to defeat the plaintiff's title. Whereas here is no malice, either express or implied. The words of the message sent by Lee are true: and they proceed from a person called upon to give notice:

either to protect his own property, or (what is his duty as a moral act) to save another from being cheated. Lee had notice of Loveday's bankruptcy, from Bolland. Lee had an interest in the fund: and he was entitled to take out a commission against Loveday. He reads an advertisement "for the sale of Loveday's estate." He was thereby called upon, in order to preserve his own interest and that of the rest of the creditors, as an honest and a prudent man, to give this notice. For, if the estate had been purchased without notice of the bankruptcy, such purchaser would have been protected by a satisfied term prior to the act of bankruptcy still standing out. When an auction was advertised and was proceeding for the sale of this estate, with intent to cheat purchasers by a false title, shall not he, as an honest man, give this notice, and prevent iniquity?

But here, this man (Lee) had a property of his own to secure; he was a creditor of Loveday, and intended to sue out a commission.

We are clear, that under such circumstances, malice cannot be implied.

No action lies for giving the true character of a servant, upon application made to his former master, to inquire into his character, with a view of hiring him; unless there should be extraordinary circumstances of express malice.

Another ground to maintain such an action as this is, "that it must be such a slander as goes directly to defeat the plaintiff's title." But in this case, the assertion does not go to defeat the plaintiff's title. [Which his Lordship showed by an [*2426] *induction of particulars, not at all necessary to be here specified, as they relate only to this single case.]

As to the second question — "Whether Le Breton's varying from the message he was charged with, and adding more than he was commissioned to declare, or even authorized to say in point of strict truth:" It appeared, that his client had told him "that he would take out a commission that night." And if he had done what he told Le Breton "that he would do," Loveday's name would have been in the Gazette on the Saturday evening following. So that there was no material variation from what he was commissioned by his client Lee to say. Nor did it make any difference with regard to the plaintiff or his title: for Loveday was then become bankrupt and liable to a commission: which commission might have been taken out upon that day, and the bankrupt's name inserted in the Gazette of the Saturday evening following.

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We are therefore all of opinion, that there is no foundation for this verdict; and that it ought to be set aside upon payment of costs.

Rule made absolute, for setting aside the verdict, and having a new trial, upon payment of costs.

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3 Taunton, 246-256 (s. c. 12 R. R. 645).

Defamation. — Slander of Title. — Malice.

In an action for slander of title it is necessary for the plaintiff to prove [246] malice in the defendant.

A lease, in which was a proviso for re-entry if the rent were in arrear 28 days, being exposed to sale by the assignee, and rent being then in arrear, the lessor announced at the sale that the vendors could not make a title, in consequence of which bidders who came to buy went away. He afterwards offered £100 for the lease, but subsequently recovered the premises in ejectment: *held*, that no action for slander of title lay against him.

In an action for slander of title, the defendant may give evidence on the general issue, that he spoke the words claiming title in himself.

This was an action upon the case for slander of title. The plaintiff in his declaration, in substance, averred, that he was possessed of a house for 24 years, the residue of a term of 31 years, under a demise from the defendant to Francklin, and an assignment made on the 31st of August, 1809, from Francklin to the defendant; that the plaintiff put up the residue of his term to sale by auction: that the defendant was present, and declared that the plaintiff could give no title if he did sell the property, and averred a special damage sustained thereby. The defendant pleaded the general issue. Upon the trial of this cause at the sittings after Easter term, 1810, before CHAMBRE, J., at Westminster, the lease was given in evidence: it contained a proviso for re-entry in case the rent, which was payable quarterly, should be behind and unpaid for 28 days after either of the days of payment. It was proved that the plaintiff, in the month of August, 1809, exposed to sale by auction his unexpired term in the premises, and that at the time of the sale, when this lot was put up, the defendant was present, and told the auctioneer it was of no use to sell the lot, or put it up; the house was his own, he was the landlord of it, and * no [* 247] title could be made to it. Some other persons were there present, who said, they had come to bid for this lot, but rather

than involve themselves in a lawsuit, they would go away without bidding for it. The auctioneer and the defendant then went into another room, where the defendant said he would buy the house: he offered £100 for the lease; but the auctioneer said he had no authority to sell it otherwise than by public auction. The defendant had, two or three weeks before the auction, applied to the auctioneer for the purchase of the lease. The auctioneer told the defendant he thought he was liable to the expenses of the auction, to which he answered, that he would rather pay ten pounds than that the plaintiff should sustain any injury. The expenses of the sale amounted to £6 8s. At that time there was half a year's rent due and in arrear, and certain parts of the premises were out of repair, and the defendant had complained of it: at the time of the trial the defendant was in possession of the premises, and it was proved that the plaintiff's attorney had recently, in the month of May preceding, tendered the defendant the payment of five quarters of a year's rent, which was in arrear, and the costs of the ejectment under which he had obtained possession of the premises, if the defendant would give back the possession. The declaration in ejectment had been served upon Franklin only, and not upon the tenant in possession; the house being at the time of the service shut up and uninhabited. Best, Serjt., for the defendant, objected that the plaintiff could not recover upon this evidence, because there was no proof of malice in the defendant, and according to the case of *Hargrave v. Le Breton*, 4 Burr. 2422 (p. 169, *ante*), in order to support this species of action, there must be proof of malice, either express or implied. 4 Co. Rep. 18., *Sir G.*

Gerard v. Mary Dickenson, 1st res. "If the defendant [* 248] had * affirmed that the plaintiff had no right to the castle and manor of H., but that she herself had right to them, in that case, because the defendant herself pretends right to them, although in truth she had none, yet no action lies. For if an action should lie when the defendant herself claims an interest, how can any make claim or title to any land, or begin any suit, or seek advice or counsel, but he should be subject to an action? which would be inconvenient." Here, although in fact no re-entry was given by the lease, upon the ground of the premises being out of repair, yet it is very probable that the defendant, who, it seems, complained of that defect, supposed that a re-entry was thereupon given, and if he so thought, that alone

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would be sufficient to repel the inference of malice: and if that had been indeed a breach of condition, the plaintiff could not have obtained relief, even in a Court of equity, to re-establish his title to the lease. The rent, however, was in arrear at the time of the sale, which is proved by the plaintiff's offer of paying the rent with the costs of the ejectment: whether the defendant has obtained a regular judgment in ejectment or not is immaterial, for inasmuch as the rent was in arrear, the title of re-entry had accrued to the defendant, which sufficiently bore him out in saying that the plaintiff had no right to sell. Pell, Serjt., for the plaintiff, urged, that if a person is about to sell property, and another, by any means whatsoever, impedes him in selling it, an action lies. The opposite principle contended for goes so far, that if one person were about to sell a chattel, as a horse, another might with impunity charge the seller with felony, in having stolen the horse, if he only took care at the same time to claim the horse as his own, although he had no property in it whatever. CHAMBRE, J., was of opinion that words of this sort must be proved to be *spoken either through express [* 249] malice, or under circumstances from which malice may be implied; and he thought there were some circumstances here which rendered it improper to withdraw the case from the consideration of the jury. He directed the jury that any man who has, or supposes he has, a title to an estate, may assert his own title, unless malice is proved to have been his motive. Some of these circumstances were rather suspicious; it did not appear that until the defendant had quitted the auction room, he said anything about his own right; he only denied the plaintiff's right to sell; and it seemed something like an admission of the plaintiff's right, that he had offered a sum for the purchase of the lease. It appeared, however, that a re-entry was given upon the non-payment of rent, and that the rent had been in arrear, wherefore the whole of the evidence, taken together, disaffirmed the idea of malice. It was moreover observable, that by the form of the condition used in this lease, it was not necessary to demand the rent in case of a re-entry; it was not like those leases in which the re-entry is given 28 days after demand made, but the re-entry here was given in case the rent should in any event be in arrear by the space of 28 days. Liberty was reserved to the defendant to take the benefit of his objection, by moving to enter a nonsuit, in case

the verdict should pass for the plaintiff. The jury found a verdict for the plaintiff, with £6 8s. damages.

Best, Serjt., in the following term obtained a rule *nisi* to set aside the verdict and enter a nonsuit, upon the ground that at the time of the sale there was rent arrear, and no express malice proved, and that where a defendant has even a colour of title, this sort of action cannot be supported; upon which occasion MANSEFIELD, C. J., asked, inasmuch as there was rent arrear, [* 250] how a man * could suffer damage by slander of title, who had no title; and CHAMBER, J., said, that after the trial, when he found how obstinate the jury were, he had repented that he had not nonsuited the plaintiff: but at first he thought there was some show of malice, since the defendant had first endeavoured to purchase the lease, and after the sale had offered to purchase it at a lower rate; nevertheless that he was afterwards convinced that those grounds were insufficient.

Frere, Serjt. (Pell, who was with him, being confined by illness), now showed cause. He contended that the defendant's treaty with the plaintiff for the purchase of the lease was a waiver of all forfeitures that might have been previously incurred; (but MANSEFIELD, C. J., held that a man may well offer a small sum for that which is his own, rather than incur the trouble of going to trial to recover it). If the defendant asserts that the plaintiff has no title, the *onus* lies upon him to prove it. And the only proof given is, of a flaw in the plaintiff's title at the time of the action brought, not of the words spoken; at the time of the act complained of, the plaintiff had the possession of the premises, and possession is a sufficient title against a wrong-doer. [MANSEFIELD, C. J. A pretty strong presumption must be made, to enable you to avail yourself of that argument; for until it is first shown that the plaintiff had a title, the defendant is not a wrong-doer.] The defendant is not entitled to avail himself of the answer that he claims title in himself, under the plea of the general issue which he has pleaded. That plea is, that he did not use the expressions, whereas his answer ought to have been, that the statement made is true that the plaintiff had no title. The species of action is of rare occurrence; but in all other cases of slander it is of daily practice, that if the defendant justifies the slander, he must specially [* 251] plead his * justification. [LAWRENCE, J. Was not the plea in *Hargrave v. Le Breton* the general issue, in which the

like defence prevailed ?] There the circumstances were very different: the defendant explained his whole objection to the title; here the defendant only throws out a dark innuendo, and never shows what his title was. [LAWRENCE, J., referred to the case of *Sir G. Gerard v. Mary Dickenson*.] In Cro. El. 196, the declaration in the same case is reported, and it charges no malice, yet the plaintiff succeeded, although the defendant made a claim of right. Therefore it is not true that no action is maintainable where the defendant claims an interest. [MANSFIELD, C. J. That position may not perhaps be supported to the full extent: if a man knows that he has not a title, and maliciously asserts that he has, perhaps it would not serve; but where there is a *bonâ fide* assertion of title, it is sufficient.] There was no proof of any demand of rent, nor of any re-entry having been made before the sale: without a demand on the 28th day, the defendant had no title of re-entry, consequently the plaintiff's title was at that time good. *Doe d. Forster v. Wandlass*, 7 T. R. 117, (4 R. R. 393). For this proviso does not make the lease absolutely void upon the non-payment of the rent, it only gives a power of re-entry, and in order to exercise that, all the formalities of a demand on the 28th day, and of a re-entry, must be previously observed. [MANSFIELD, C. J., and HEATH and CHAMBRE, Justices, denied this. CHAMBRE. If the proviso made the lease actually void, some sort of re-entry would be equally necessary to indicate the lessor's will to determine it.] *Duppa v. Mayo*, 1 Williams's Saunders, 287, note 16: all the authorities are there collected. [MANSFIELD, C. J. You need not labour that point, that in the case of a re-entry upon condition for non-payment of rent according to the *reddendum*, a demand and several other formalities are necessary. Those points are all perfectly well known, * and laid down. Co. Litt. 201. LAWRENCE, J., [* 252] adhered to the doctrine of *Doe d. Forster v. Wandlass*, that a demand was necessary here.] The statute 4 Geo. II., it is true, dispenses with these formalities, but the defendant has not brought himself within that statute; and the words of that act confirm the doctrine, that at common law both a demand and re-entry are necessary. [LAWRENCE, J. Re-entry is now necessary in no case but to avoid a fine.] Even if the proviso had been that the lease should be absolutely null and void, a demand of the rent would have been necessary: so a rent *in nomine pænæ* cannot be enforced until a demand of the original reserved rent has been made. 1 Rolle,

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Ab. 459, Co. Lit. 202 a. [MANSFIELD C. J. Lord KENYON, C. J., certainly lays it down very unreservedly in *Doc d. Forster v. Wandlass*, that on a proviso for re-entry there must be a demand and all the formalities attendant upon a condition broken; but the common import of these words is, that "if I do not pay you your rent within the 28 days, you shall re-enter:" and within the 28 days the tenant must find out his landlord, though he be 200 miles off, if he is within the four seas, and pay him his rent, otherwise his estate is voidable; but I do not think the case turns upon this point, nor do I agree that the *onus* of proof is on the defendant.] Next, admitting that the defendant could justify some slander, he cannot justify the terms he has made use of. Cro. El. 427, pl. 28; *Pennymann v. Rabancks*, Mo. 410, pl. 558. The words spoken upon a sale were, "I know one that hath two leases of his land, who will not part with them at any reasonable rate;" and the defendant justified by reason of leases made to himself, and upon verdict for the plaintiff, and motion in arrest of judgment, the Court held the plea bad. So *Earl of Northumberland v. Byrt*, Cro. Jac. 163. The plaintiff declared that the defendant said, "The late Earl of Arundel, lord of the manor of Hazel-[* 253] bert Brian, did make a lease *of my tenement in Hazelbert to one Mr. Stoughton for 60 years, to begin after the expiration of my customary estate, &c., and the same is a good lease;" *ubi reverâ*, the said Earl of Arundel did not make any such lease. This defendant justified, that the earl made such a lease, and that Stoughton assigned to the defendant, wherefore, for maintenance of his title he spoke these words. Upon a replication, *de injuriâ suâ propriâ*, and issue joined thereon, a verdict was found for the plaintiff: and it was moved in arrest of judgment, upon the ground that he justifying the words by reason of the assignment of the lease, and in maintenance of his own title, an action lay not; *sed non allocatur*: for in his words he doth show that he spake them for himself, and in maintenance of his own title; for it is lawful for every one to speak in countenance and maintenance of the title which he claims; but the words in themselves import that he spoke them to countenance the title and interest of a stranger, which is not lawful. And now, when he is sued to be punished for them (they being false as is pretended), he cannot excuse himself by entitling himself, when the words did not at first import as much." [All the Court agreed, that in both of

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these cases the pleas were no otherwise bad, than because they were false, and not consonant to the facts; so that the issues were properly found against the defendants.] The reasons there given are good, and are founded on good sense, and in this case, if the lessor had explained the grounds on which he conceived himself entitled to re-enter, the auctioneer, who exposed the premises to sale upon the terms of the vendor's clearing off all incumbrances to Michaelmas, 1809, would immediately have healed the defect of title, by tendering to the defendant his rent up to the time of the sale, and the costs of the ejectment; after which the title of the vendor would have been good again. *Mildmay's case*, 1 Co. Rep. 177, it was held that an action might be maintained for insisting on that as a lease, which was so doubtful that the Court hesitated whether it were a lease or not. That indeed was the case of words spoken by a person not interested in the property. In *Hargrave v. Le Breton*, the Court thought that the weight of the evidence disaffirmed the presumption of malice; but this defendant, so far from going to prevent the lease from being sold, goes with an intention to purchase it himself, and offers £100, an inferior consideration, for that which he knew to be of value. The question of malice has been submitted to the jury, and they have affirmed it.

* Best, Serjt., *contra*, was stopped by the Court. [* 254]

MANSFIELD, C. J. The ground of this action is, that the defendant is supposed falsely and maliciously to slander the title of the plaintiff. Here is an auction, and the plaintiff's estate is put up; it does not appear whether the plaintiff was present: the auctioneer, as agent for the vendor, probably knew something of the estate: the defendant says, the plaintiff cannot make a title; the auctioneer asks no questions; if he had asked, and the other had affirmed something false, it might have been different: it does not appear how the persons came to disperse: for, generally, persons attending a sale would not disperse on the word of a stranger; but it was said by the counsel that there were only two or three persons there present. At the time of the trial, the defendant was in possession of the premises; but it does not appear how; the plaintiff however knew how, and might have explained it by evidence, and except for the lease, upon which the plaintiff was entitled to equitable relief, the defendant had then, in fact, as good a title as he had before he had demised. Stopping here then, what

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[* 255] evidence is there of malice? What evidence that * the plaintiff meant anything more than to assert his right to that possession, which he afterwards obtained before the cause was tried? On the part of the plaintiff it is not said, the defendant ought to prove his title: that is not necessary; for pretty strong cases say, that if a defendant says he has title to an estate no action will lie against him, therefore it cannot be incumbent on him to prove his title. But it is objected, that supposing this was a case where a claim of title in the defendant might be a ground of defence, yet he cannot give it in evidence on a plea of the general issue. That however is directly opposite to the case of *Hargrave v. Le Breton*, where the general issue was pleaded; but, according to common sense, it cannot be necessary to plead specially. He alleges that the defendant has slandered his title maliciously; if he had no title, he had nothing to be slandered. The slander also must be malicious, and what proof of malice is here? I think the rule must be made absolute for a nonsuit.

HEATH, J. I am of the same opinion. There is no pretence of express malice, and as little proof of implied malice.

LAWRENCE, J. I am of the same opinion. An action can only be maintained where the words are spoken maliciously. It is not necessary to plead specially, it is for the plaintiff to prove malice, which is the gist of the action, and is a part of the declaration important to be proved by the plaintiff. The specially pleading a justification would admit the facts stated in the declaration, and amongst others the malice. Now as to the facts, what is this case? A man thinking he has a right to recover possession of a term for some misconduct of his tenant, and hearing the term is to be sold, goes to the auction, and says, the vendor cannot [* 256] make a title: now * does not he act herein as an honest man? What would have been said, if he had lain by, and permitted another to purchase it, before he disclosed his claim? The rule therefore must be made absolute for a nonsuit.

CHAMBERE, J., concurring.

The Rule was made absolute.

ENGLISH NOTES.

The plaintiff purchased Blackacre from A., and was about to demise it to B., when C. falsely said that she had a lease over Blackacre. She produced a forged lease in proof of her assertion. She was held to be liable. *Gerard v. Dickenson* (1590), 4 Co. Rep. 18.

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The plaintiff put up for auction eight unfinished houses in X. The defendant, a surveyor of roads, appointed under 7 & 8 Viet. c. 84, had previously insisted that these houses were not built in conformity with the Act. He attended the sale and announced that he would not allow the houses to be finished until the roads were made good. Only two houses were sold. It was held that the defendant acted under a mistaken sense of his duty but not maliciously, and that no action lay. *Pater v. Baker* (1847), 3 C. B. 831, 16 L. J. C. P. 124. Similarly no action lies when the defendant makes a representation *bonâ fide* for the purpose of protecting the interest of his connections or relatives. *Pitt v. Donoran* (1813), 1 M. & S. 639, 14 R. R. 535; *Gutsole v. Mathers* (1836), 1 M. & W. 495, 2 Gale 64, 5 D. P. C. 69; *Watson v. Reynolds* (1826), Moo. & Mal. 1; *Parley v. Seratton* (1886), 3 Times Law Rep. 146.

A. having bought goods from B., C. maliciously caused B. to refuse to deliver them, by asserting that he had a lien on the goods, well knowing that he had no lien. He was held liable. *Green v. Button* (1835), 2 Cr. M. & R. 707. So in *Bailey v. Wulford* (1846), 9 Q. B. 196, 15 L. J. Q. B. 369, a demurrer was overruled to a declaration that the defendant, in order to defraud the plaintiff, had represented that the pattern of goods which the plaintiff intended to sell was a registered design, and that the plaintiff had in consequence incurred expense and had been prevented from selling his goods.

Declaration that the plaintiff was the proprietor and possessor of the Argyll Rooms, adapted for a dancing academy, or subscription ball-room, or a concert room, that the defendant falsely and maliciously published the following: "Argyll Rooms. Notice is hereby given that the magistrates of the County of Middlesex having this day refused to renew a music and dancing license to the proprietor of the above rooms, all such entertainments there carried on, whether advertised under the name of an academy, subscription ball, concert or otherwise, are illegal; that the proprietor renders himself thereby indictable for keeping a disorderly house, and that every person who shall be found upon the premises is liable to be apprehended and dealt with according to law." And that the plaintiff was thereby prevented from utilizing the rooms to profit. On demurrer it was held that the declaration disclosed a good cause of action. *Bignell v. Buzzard* (1858), 3 H. & N. 217, 27 L. J. Ex. 355.

The widow of an intestate, to whom she acted as executor *de son tort*, executed a bill of sale of the goods of such intestate to A., one of his creditors, for securing the debt due. After her death, the plaintiff became the lawful administrator of the estate of the said intestate, and as such caused the goods which had been assigned by the bill of

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sale to be put up for sale by auction, when the defendant, who was A.'s agent, attended and forbade the sale taking place, saying he held a bill of sale over everything in the house in favour of A. The defendant had received a letter from the auctioneers the day before the sale, telling him that the bill of sale was valueless, as the widow had no title to the goods. The plaintiff was nonsuited. It was held that the nonsuit was right, as the defendant was not liable unless he acted maliciously, and that, notwithstanding the letter from the auctioneers, there was no evidence from which a jury could have found malice. *Steward v. Young* (1870). L. R., 5 C. P., 122, 39 L. J. C. P. 85, 22 L. T. 168, 18 W. R. 492.

The owner of a property called by a particular name brought an action against the defendant, owner of the adjoining property, to restrain him from calling his property by the same name. The statement of claim alleged inconvenience, injury and consequent damage by way of depreciation to the plaintiff's property, but did not allege malice, or intention to cause damage, or any facts, except the mere damage, to support the general term "injury." It was held that no right of action was disclosed. *Day v. Brownrigg* (C. A. 1879), 10 Ch. D., 294, 48 L. J. Ch. 173.

The plaintiff, who was the registered proprietor of a certain trade-mark, and a dealer in a brand of champagne introduced by him and known as the Delmonico Champagne, sued the defendant for falsely and maliciously publishing certain statements imputing that he had no right to use the trade-mark, and that the champagne sold by him was not of the brand named. Before trial, the plaintiff died. His executrix was held entitled to maintain the action if special damage were proved. *Hatchard v. Mège* (1887), 18 Q. B. D. 771, 56 L. J. Q. B. 397, 56 L. T. 662, 35 W. R. 576 (referred to in Notes to *Humbly v. Trott*, No. 20 of "Action" 2 R. C. 13).

Actions of slander of title are sometimes brought in connection with patents, copyrights, &c. In *Wren v. Wild* (1869), L. R., 4 Q. B. 730, 38 L. J. Q. B. 327, 10 B. & S. 51, the plaintiff and the defendant were each of them possessed of a separate patent for the construction of spooling machines. The plaintiff was negotiating for the sale of his patent to various manufacturers, some of whom were already using it under licenses from him. The defendant wrote to these manufacturers alleging that the plaintiff's patent infringed his patent and that if they used it without paying royalty to him (the defendant) he would take legal proceedings against them. The result was that the plaintiff lost the sale of his patent. He brought this action, averring the above facts and alleging malice on the defendant's part. The plaintiff tendered evidence to show that the defendant's patent was

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void for want of novelty. This evidence was rejected and a nonsuit entered. It was held that the nonsuit was right, for the plaintiff ought to have proved malice on the part of the defendant, and if the plaintiff failed to prove that the threat was *malâ fide* and without any intention to follow it up by an action against purchasers, it was immaterial to show that the defendant's patent was void, and that an action for infringement of it must have failed.

On the other hand the judgment of the Court in *Wren v. Weild*, *supra*, suggests that a patentee has no right, unless he has the *bonâ fide* intention of maintaining his patent by action against infringers, to threaten such action so as to damage the trade of a rival: and in two cases, *Robbins v. Hinks* (1872), L. R., 13 Eq. 355, 41 L. J. Ch. 358, and *Armann v. Lund* (1874), L. R., 18 Eq. 330, 43 L. J. Ch. 655, Vice-Chancellor MALINS granted an injunction to restrain such threats, on the mere ground that the plaintiff declined to take proceedings to establish the validity of his patent. These cases were considered in *Halsey v. Brotherhood* (1880), 15 Ch. D. 514, 49 L. J. Ch. 786. There it was laid down by the MASTER OF THE ROLLS (SIR G. JESSEL), that a patentee is entitled for the protection of the *primâ facie* right conferred by his patent, to warn persons intending to deal with a rival manufacturer, provided the warning is given *bonâ fide* in assertion of his legal rights; and that the patentee is not bound as the condition of obtaining relief to follow up the warning notices by actual legal proceedings. The case would be different where the warning is given in bad faith, or with a knowledge of the invalidity of his patent. The judgment was affirmed in the Court of Appeal (1882), 19 Ch. D. 386, 51 L. J. Ch. 233, the Court considering that it was in accordance with the true principle of *Wren v. Weild*, *supra*.

The law on this subject has now been defined by section 32 of the Patent and Trade Marks Act. 1883, which is as follows: "Where any person claiming to be the patentee of an invention, by circulars, advertisements or otherwise threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale, or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats. Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent."

Under this section it has been held (by NORTH J.), that, if the

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threat of legal proceedings is actually followed by a *bonâ fide* action for infringement, even though the action is against a licensee who could not contest the validity of the patent, the defendant cannot be sued for issuing the threats, — the object of the proviso being merely to furnish a criterion for testing the *bona fides* of the threats. *Barrett v. Day* (1890), 43 Ch. D. 435, 59 L. J. Ch. 464, 62 L. T. 597, 38 W. R. 362. The action need not be commenced against the party suing in respect of the threat. It is sufficient if the patentee brings a *bonâ fide* action with due diligence, against any person to whom a notice of threat has been issued in connection with the right of the plaintiff. *Challender v. Royle* (C. A. 1887), 33 Ch. D. 425, 56 L. J. Ch. 995, 57 L. T. 734, 36 W. R. 357.

In the above action of *Challender v. Royle* important questions were considered, as to what are the conditions of the enacting part of section 32. Although in the result a decision upon these questions was unnecessary for the purpose of the judgment, the following points are stated in the judgment of BOWEN, L. J., as coming within his view of the meaning of that part of the section: — (1) The section gives a new right of action to a person aggrieved by a threat in regard to the future. (2) It must be a threat in respect of an alleged actual (not merely proposed) manufacture. (3) That the plaintiff must establish his legal rights including — if the defendant raises the question — the validity of his patent. And (4) that, if the plaintiff applies for an interlocutory injunction, he must make out a *primâ facie* case — the validity of the patent (if the question is raised) being essential to the right.

An action commenced against a third party to whom notice of threat has not been issued in respect of the plaintiff's alleged infringement, has been held (by KEKEWICH, J.) not sufficient. *Combined Weighing Machine Company v. Automatic Weighing Machine Company* (1889), 42 Ch. D. 665, 58 L. J. Ch. 709, 61 L. T. 474, 38 W. R. 233.

In *Colley v. Hart* (1890), 44 Ch. D. 179, 59 L. J. Ch. 308, 62 L. T. 124, 38 W. R. 501, it was held by NORTH, J., that if an action for infringement has been *bonâ fide* commenced, although the plaintiff in that action has discontinued it upon discovering that the manufacture was not an infringement, — the fact that he had "with due diligence commenced and prosecuted" his action down to the time of discontinuance, is sufficient, under s. 32, to avoid the cause of action for threatening legal proceedings.

AMERICAN NOTES.

Both principal cases are cited by Townshend (Slander and Libel, p. 208); and by Newell (Defamation, pp. 201, 205, 207); and their doctrine is supported in *Kendall v. Stone*, 5 New York, 11; citing *Smith v. Spooner*; *Dodge*

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v. Colby, 108 New York, 445; *Walkley v. Bostwick*, 49 Michigan, 374; *Hill v. Ward*, 13 Alabama, 310; *Stark v. Chetwood*, 5 Kansas, 141; *McDaniel v. Baca*, 2 California, 326; 56 Am. Dec. 339; *Ross v. Pynes*, Wythe (Virginia), 71; *Dodge v. Colby*, 108 New York, 445; *Andrew v. Deshler*, 43 New Jersey Law, 16; 45 *ibid.*, 168; *Gent v. Lynch*, 23 Maryland, 58; 87 Am. Dec. 558; *Fint v. Hutchinson S. B. Co.*, 110 Missouri, 492; 33 Am. St. Rep. 476; *Swan v. Tappan*, 5 Cushing (Mass.), 104; *Burkett v. Griffith*, 90 California, 532; 13 Lawyers' Rep. Annotated, 707.

The defendant is not responsible for words or acts in pursuance of a claim *bonâ fide*, of title. *Bailey v. Dean*, 5 Barbour (New York), 297; *Meyrose v. Adams*, 12 Missouri Appeals, 329; *Andrew v. Deshler*, *supra*; *Hill v. Ward*, *supra*; *Van Tuyl v. Riner*, 3 Bradwell (Illinois Appellate Ct.), 556; *Harriss v. Sneed*, 101 North Carolina, 273.

Nearly all these cases show that it is essential also to prove special damages.

"But whenever a man unnecessarily intermeddles with the affairs of others with which he is wholly unconcerned, such officious interference will be deemed malicious, and he will be liable if damages follow. It is enough for the plaintiff to establish the speaking or writing of the words, their falsity, and that there was no ground for the defendant's claim." Townshend on Slander and Libel, p. 203.

In *Bailey v. Dean*, 5 Barbour (New York Supreme Ct.), 297, it was held that if the words in question are uttered in pursuance of a claim of title, and "if there be some ground for the claim, the cases all agree that the action cannot be sustained." Citing *Smith v. Spooner*. Although the title asserted by the defendant was invalid, yet if asserted in good faith, without malice, he is not subject to action for slander. "Malice is a necessary ingredient" to recovery. *Hill v. Ward*, *supra*. "An essential element of this cause of action is the false and malicious statement or representation as to the title, and special damage to the complaining party occasioned thereby." *Harriss v. Sneed*, *supra*.

SECTION IX. — *Criminal Proceedings.*No. 16. — *REX v. GRANT.*

(K. B. 1834.)

RULE.

UNTIL the change introduced by the statute 6 & 7 Vict. c. 96, evidence was inadmissible to show that a libel, the subject-matter of a criminal information, was true.

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5 Barnewall & Adolphus 1081–1087 (s. c. 3 N. & M. 105).

Libel. — Justification.

[1081] Where an information for libel states that certain transactions took place, and that the libel was published of and concerning them, and then sets out the libel as referring to them, and the prosecutor, at the trial, gives general proof of such transactions, to support the introductory part of his pleading, the defendant is not thereby authorized to give evidence of the particular history of those transactions, so as to bring into issue the truth or falsehood of the libel.

But if such evidence be adduced *bonâ fide*, to show that the transactions referred to in the alleged libel are not the same with those which the information supposes it to have had in view, and the Judge is informed that the evidence is offered for that purpose, it is admissible.

Affidavits are not receivable to show that a Judge is mistaken in his report of a cause tried before him.

Criminal information for a libel. The information stated that, before the committing of the offences, &c., a commission had issued against the defendant, Patrick Grant, and assignees had been appointed; that before the issuing of such commission, Grant had been a co-proprietor of a newspaper with one Young, and that “certain transactions had taken place since the said bankruptcy respecting the sale by the assignees of the said Patrick Grant of his interest in the said newspaper.” The information then charged, that the defendants contriving, &c., to defame the solicitor to the commission, and one of the assignees, and to cause it to be believed that they had been guilty of fraud and breach of trust in the execution of their respective duties in relation to the said commission, &c., published of and concerning the said commission of bankrupt, and of and concerning the said assignee and solicitor under the said commission, “and the said transactions as aforesaid,” a certain false, &c. libel, containing the false, &c. matters of and concerning the said assignee and solicitor respectively following, that is to say. The libel was then set out. It contained several injurious statements of the conduct of the prosecutors in transactions relative to Grant’s bankruptcy, and accused them of “fraud and falsehood,” and of “swindling,” in the discharge of
[* 1082] * their respective functions; stating, among other things, that, in order to defraud the creditors, they had made a

false assertion respecting a purchase of the newspaper by Young; that by such false assertion, Young had been enabled to maintain a Chancery suit against the creditors; and that, at a late meeting of the creditors, it had appeared that Young withdrew the allegation of his having made such purchase. At the trial before DENMAN, C. J., at the sittings in Middlesex after last Michaelmas term, the solicitor and assignee were called as witnesses for the prosecution, and, in their examination in chief, gave general evidence of the facts stated in the inducement; and in particular, that transactions had taken place after the bankruptcy, relating to the sale by Grant's assignees of his interest in the newspaper. Kelly, for the defendants, endeavoured, in cross-examination, to go into the particulars of the several transactions respecting the sale of Grant's interest in the paper. The LORD CHIEF JUSTICE, considering this an attempt to bring into question the truth or falsehood of the libel, refused to allow such questions to be put. The defendants were found guilty. In this term (January 15th),

Kelly moved for a rule to show cause why a new trial should not be had, on account of the above-stated rejection of evidence. The objection to these questions was, that by asking them, the truth of the libel might incidentally be brought in question. But if certain transactions are averred in the introductory part of the information, and the averment as to them is a material one, evidence must be gone into respecting them. The LORD CHIEF JUSTICE thought that evidence might be *given [* 1083] to show generally that such transactions had happened, but not what the nature of them was; but it was necessary to go into the particulars, in order that the jury might judge whether a true character had been given of the supposed libel in the introductory averments. They are to decide on the whole matter, and an essential part of it is, not only whether the transactions referred to had happened, but whether they were of such a nature as the information suggests, and whether the publication complained of was a libel with relation to them. The jury could not judge of that without the evidence which it was proposed to go into. Lord MANFIELD said in *Rex v. Horne*, Cowp. 679: "The gist of every charge of every libel consists in the person or matter of and concerning whom or which the words are averred to be said or written." Here the gist of the charge was the transactions relating to the sale of the newspaper. In *Rex v. Horne*, Cowp. 672, where the information

stated the libel to be "of and concerning his Majesty's government and the employment of his troops," but no particular statement was made as to the occasion on which the troops had been employed, and to which the libel referred, the defendant proposed to give in evidence an affidavit, published before the libel, relating to the employment and conduct of the king's troops in an encounter with the insurgents in America. Lord MANSFIELD said (in delivering the judgment of the Court), "I told the defendant, if he meant to prove the facts to be true as above, it could not be done by

affidavit, the person himself being present, and even if he [*1084] was absent, they could not be proved by affidavit; *but

if he meant to show that at the time there existed a public account in the newspapers, which might be of use to restrain or qualify the meaning of the paper in question upon the information, he might do so." Upon the same principle the evidence was admissible here, to show what transactions the writing in question referred to, and whether, taken with reference to them, it was libellous. If an indictment charged that a bankrupt had passed his examination, and that a libel had been published concerning it, stating that the bankrupt had, on such examination, sworn contradictory matters, and thereby committed perjury; it cannot be said that the particulars of the examination itself might not be gone into, it being incorporated with the libel by the introductory averment. In the present case it is stated as part of the libel, that the solicitor and assignee are alleged to have made a false allegation respecting the sale of the newspaper, to defraud the creditors; this is one of the transactions of and concerning which the libel is said to have been published: how can the Jury say that the publication is a libel respecting, and applicable to, a transaction so described, unless they know particularly what the transaction was? [DENMAN, C. J. The falsehood imputed in that transaction was not in itself insisted upon; the ground of complaint was the foul and calumnious language that ran through the whole publication. In the part in question, it was not merely said that a false statement was made on a particular subject, but that it was made to defraud the creditors.] The prosecutors might have relied upon the general abuse merely; but they have, by their introductory averments, incorporated particular transactions with the subject-matter of the charge; and if their case [*1085] be such *as to require proof of matters which may bring

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the truth or falsehood of the libel into question, the defendant is not therefore to be precluded from examining into the matters so introduced.

DENMAN, C. J. Undoubtedly the defendants in pleading to this information, put in issue all the material allegations contained in it; I admit without reserve, that it was in issue whether or not the alleged libellous matter related to the transactions mentioned in the introductory averments of the information. And if counsel for the defendant, in a case like this, were to say, *bonâ fide*, "I propose entering upon this evidence to show that what is stated in the information is not proved, for that the libel does not apply to the transaction referred to by the pleading; and in order to show that, the evidence must be gone into;" it would then be admissible. But in this case it was taken for granted that the transactions had happened, and that the libel related to them; the object in offering this evidence was to show that it related to them justly. It came then to the question, whether or not the truth of a libel can be put in issue on an information. I have always thought it could not. The reason now given for going into the evidence in question was not suggested, and the Judge who tries a cause ought to be informed of the purpose for which evidence is offered.

LITLEDALE, J. I entirely concur. If the evidence had been offered to prove that the libel did not relate to those transactions which the information applied it to, the inquiry might have been pursued; but not with any other view.

*TAUNTON, J., concurred.

[* 1086]

PATTESON, J. I am of the same opinion, for the reasons given by my lord, which I need not repeat.

Rule refused.

On this day, the defendants were brought up for judgment, and

Kelly renewed his former application, stating that on reference to another gentleman who was counsel in the cause, and to a shorthand writer's note, he found that the evidence had been offered at the trial, as bearing upon the question, whether or not the transactions referred to by the libel were the same as those mentioned in the introductory part of the information, and that, in particular, it had been asked, "how the jury could know that the transactions were the same, if such evidence were not gone into?" [DENMAN, C. J. My note and my recollection are distinct on the

subject. It might perhaps be said by way of argument, ‘how can the jury know that the transactions were the same, without this evidence?’ but the object always was to introduce the truth of the statements in the libel. If the evidence had been, or could have been offered, *bonâ fide*, for the purpose now suggested, it would have been different. If counsel had told me that they really put the questions for the purpose of showing that the libel did not relate to the transactions referred to in the information, I should have allowed them to be put, though I should have been surprised at the mode of proceeding. But when it was suggested that merely because certain transactions were spoken of [*1087] in the introductory part of *the information, the defendant’s counsel might go into the history of those transactions, I could not allow such a course to be taken.]

Kelly offered to put in the short-hand writer’s notes, and affidavits of the circumstances under which the evidence was offered.

DENMAN, C. J. I will not hear affidavits as to what passed at the trial, unless the Court tell me that I ought.

LITTLEDALE, J. The affidavits cannot be received.

TAUNTON, J. The question is, whether the affidavits of bystanders are to be admitted, to prove that the Judge who presided at a trial is guilty of mistake as to what passed. If such affidavits were now received, it would be the first instance of such a practice, and would produce the greatest injury to the administration of justice.

(PATTESON, J., was in the Bail Court.)

The defendants then received judgment.

ENGLISH NOTES.

Lord Campbell’s Act, 6 & 7 Vict. c. 96, s. 6, enacts that “on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and that to entitle the defendant to give evidence of the truth of such matters charged as a defence to an indictment or information, it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be pub-

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lished, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published. . . . Provided always that the truth of the matters charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea or justification. '

The statute does not apply to blasphemous, obscene, or seditious publications. *Reg. v. Duffy* (1874), 9 Ir. L. R. 329, 2 Cox, C. C. 45; *Ex parte O'Brien* (1881), 12 L. R., Ir. 29, 15 Cox, C. C. 180.

Truth is no defence, where the statute does not apply. It has been held that a magistrate in a preliminary investigation of a charge of libel has no power to receive and perpetuate evidence of the truth of matters charged. *Reg. v. Townsend* (1866), 4 Fost. & Fin. 1089, 10 Cox, C. C. 356; *Reg. v. Sir Robert Carden* (1880), 5 Q. B. D. 1, 49 L. J. M. C. 1, 41 L. T. 504, 28 W. R. 133. By the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60, s. 4), the rule upon this point has been altered with respect to the hearing, before a Court of Summary Jurisdiction, of a charge against a proprietor, publisher or editor, or any person responsible for the publication of a newspaper, for a libel published therein. The Court may receive evidence that the publication is for the public benefit, and that the matter is true.

In *Reg. v. Holbrook* (1879), 4 Q. B. D. 42, 48 L. J. Q. B. 113, 39 L. T. 536, 27 W. R. 313, it was decided that the general authority of the editor of a newspaper to use his discretion in the insertion of articles was not of itself sufficient to debar the proprietor of the newspaper from proving by way of defence, under section 7 of the Act 6 & 7 Vict. c. 96, that the publication was made without his consent, knowledge or authority. In *Reg. v. Bradlaugh* (1883), 15 Cox, C. C. 217, Mr. Bradlaugh and Mrs. Besant were the proprietors of two papers, A. and B., and Ramsay was their manager. They subsequently made over complete control of the paper A. to Ramsay. In one of the issues of this paper, certain obscene libel appeared and for this Mr. Bradlaugh was prosecuted. He proved that he had no hand in or knowledge of the obscene publication. He was discharged.

Another respect in which a criminal prosecution for libel differs from a civil action for the same cause, is that publication to a stranger is not necessary. It is sufficient if the libel has been shown to the prosecutor himself and to no one else. *Hick's Case*, Hobart, 215; *Clutterbuck v. Chafers* (1816), 1 Starkie, 471, 18 R. R. 811; *Reg. v. Brooke* (1879), 7 Cox, C. C. 25, — the reason being that a publication to the party himself tends to a breach of the peace. (See *Barrow v. Llewellyn*, referred to in notes to Nos. 2 & 3, p. 36, *ante*). On a similar principle, the only ground on which a criminal prosecution will lie for defaming the memory of a deceased person is that it was done with a design to

bring contempt on the family of the deceased, and to stir up the hatred of the King's subjects against them, and to excite his relations to a breach of the peace. *R. v. Topham* (1791), 1 T. R. 126, 2 R. R. 343. *Reg. v. Labouchere* (1884), 12 Q. B. D. 320, 53 L. J. Q. B. D. 362, 50 L. T. 177, 32 W. R. 861.

The case of *Reg. v. Adams* (1888), 22 Q. B. D. 66, 58 L. J. M. C. 1, 59 L. T. 903, 16 Cox, C. C. 544, affords a strange application of this rule. Miss A. advertised for a situation in the *Daily Telegraph*, and requested the replies to be addressed to "K." at an address where her brother-in-law had an office. The defendant wrote to "K." at the address stating that he had no situation to offer her, but that he would make a proposal for her consideration, — being in effect an immoral and indecent overture. The letter was opened by Miss A.'s sister, who gave it to her husband; and the husband handed it over to the police. Miss A., it appears, never saw the letter. It was held that the defendant had brought himself within the pale of criminal law by having published an indecent libel on Miss A.

By the Libel Law Amendment Act, 1888, s. 8, the permission of a judge has to be obtained previous to the institution of criminal proceedings against a libellor. Such permission is given only when, from the circumstances of the case, a remedy by civil action will not be sufficient. See *Ex parte Pulbrook* (1892), 1892, 1 Q. B. 86, 61 L. J. M. C. 91, 66 L. T. 159, 40 W. R. 175, 17 Cox, C. C. 464. The reasons for which, previously to this Act, the Court would grant a rule for a criminal information, are fully discussed by *Reg. v. Labouchere, supra*.

By s. 9 of the same Act, the person prosecuted for libel is declared to be a competent witness.

The 6th section of the Libel Act, 1843, provides that "if any person shall maliciously publish any defamatory libel," he shall be liable to punishment as there mentioned.

In *The Queen v. Munslow* (C. C. A. 2 Feb. 1895), 1895, 1 Q. B. 758, 64 L. J. M. C. 138, the defendant was convicted upon an indictment under the statute, charging that he "unlawfully did write and publish a certain defamatory libel of and concerning T., according to the tenor and effect following," &c. A motion was made for arrest of judgment on the ground that the indictment did not contain an averment that the defendant published the libel "maliciously." It was held that the section of the statute did not create a new offence, or purport to give any definition of an existing offence; that the word "maliciously" was not therefore necessary to the description of the offence, — malice being sufficiently implied by the statement that the defendant published a libel; that the effect of the word "maliciously" being expressed in

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the statute was merely to give the defendant the opportunity of rebutting the legal presumption of malice by showing that the words were privileged or published on a lawful occasion, or that they were true and for the public benefit. The conviction was accordingly affirmed.

AMERICAN NOTES.

The doctrine in question has never been much discussed in this country. The maxim, "The greater the truth the greater the libel," found little footing here after the Revolution, because the common law was generally changed by enactment, either in the constitutional or statutory laws of the States, and the rule was adopted that the truth may always be pleaded in defence. The new doctrine was urged by Alexander Hamilton in the celebrated case of *People v. Croswell*, in the Supreme Court of New York. 3 Johnson's Cases, 336, in the year 1804, an indictment for libel of President Jefferson. Half a century earlier, Andrew Hamilton, a noted Philadelphia lawyer, had been imported to defend Peter Zenger, a New York printer, on a charge of libel against the government, and he had ably but vainly urged the same doctrine in contravention of the common law rule. Alexander Hamilton's argument, one of the most famous ever delivered in America, produced but a division of opinion among the four judges in the *Croswell* case, Chief Justice KENT giving an elaborate opinion in favour of the amelioration of the rule now prevailing, and allowing the jury to judge of the combined law and facts. This opinion will always constitute a valuable historical document, and its conclusions are as follows: "Upon every indictment or information for a libel, where the defendant puts himself upon the country, by a plea of not guilty, the jury have a right to judge not only of the fact of the publication, and the truth of the innuendoes, but of the intent and tendency of the paper, and whether it be a libel or not;" and "I adopt, in this case, as perfectly correct, the comprehensive and accurate definition of one of the counsel at the bar (Gen. Hamilton), that the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals." The indecisive result led to the adoption of a legislative enactment, in 1805, in conformity with Hamilton's contention and Kent's opinion, and this is the nearly universal rule in this country, embodied in many if not in most instances in the constitutions of the States. (See *King v. Root*, 4 Wendell (New York). 114; 21 Am. Dec. 102.)

The doctrine of *People v. Croswell* was adopted in *Respublica v. Dennie*, 4 Yeates (Penn.). 267; 2 Am. Dec. 202, citing the argument of Hamilton, almost with the authority of a judicial decision; but making the absence of evil intent essential to acquittal. In *Commonwealth v. Clap*, 4 Massachusetts, 163; 3 Am. Dec. 212, (A. D. 1809), it was said: "The publication of a libel maliciously, and with intent to defame, whether it be true or not, is clearly an offence against law, on sound principles," and it was held that after evidence of justifiable purpose the defendant may prove the truth to negative malice. But in *State v. Burnham*, 9 New Hampshire, 34; 31 Am. Dec. 217, it was said: "If upon lawful occasion for making a publication, he has pub-

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lished the truth and no more, there is no sound principle which can make him liable, even if he was actuated by express malice." "It has been said that it is lawful to publish truth, from good motives and for justifiable ends. But this rule is too narrow. If there is a lawful occasion — a legal right to make a publication — and the matter true, the end is justifiable, and that in such case must be sufficient."

In *Commonwealth v. Blanding*, 3 Pickering (Mass.), 301; 15 Am. Dec. 214 (1825), it was held that ordinarily the truth is not a defence, but that it may be given to negative malice where justifiable purpose is shown, and that its admission is for the Court to determine. (But the law was subsequently changed by statute so that truth, with good motives and for justifiable ends, is a complete justification.)

In *Commonwealth v. Morris*, 1 Virginia Cases, 175; 5 Am. Dec. 515 (A. D. 1811), it was held that although at common law the truth was no defence and could not be proved, yet as the Constitution derived all power from the people and vested it in the magistrates, "The people have a right to be informed of the conduct and character of their public agents," and on an indictment for libel of public officers the truth is a justification and may be given in evidence.

At an early day the English doctrine was followed in South Carolina, observing: "It is true that a difference of opinion did for some time subsist among the English judges, on the law respecting libels, but this was only on the question whether the Court or the jury should decide on the criminal intent." *State v. Lehrs*, 2 Treadway, 809; 3 Wheeler Crim. Cas. 282 (A. D. 1811). The Court also said that the rule did not originate in the Star Chamber, but in the Roman law, and that "there does not exist in the whole system of our laws a rule better supported by reason than the one under consideration," because the contrary "tends to *provoke* quarrels and private revenge," and the rule "serves to protect from public exposure secret infirmities of mind and body, and even crimes which have been repented of and forgiven." "Shall he be allowed," exclaim the Court, "to disturb the sacred work of reformation, and rob the poor penitent of the blessed fruits of her repentance? Justice, charity, and morality all forbid it; and thank God! the law forbids it also."

In South Carolina, under a constitutional provision that "In all indictments for libel the jury shall be the judges of the law and the fact," it was held that this simply empowered the jury to render a general verdict as in other cases, and that it is still the duty of the judge to declare the law to the jury. *State v. Syphrett*, 27 South Carolina, 29; 13 Am. St. Rep. 616. But under the Missouri law, whereby "The truth may be given in evidence and shall constitute a complete defence, and the jury under the direction of the Court shall determine the law and the fact," the jury are not bound to accept the instructions of the Court as conclusive, and the Court may so charge them. *State v. Armstrong*, 106 Missouri, 395; 27 Am. St. Rep. 361.

See note, 21 Lawyers' Rep. Annotated, 509; 4 Lawson's Criminal Defences, p. 608; 2 Bishop's Criminal Law, sect. 919-921. The latter author observes that the legislatures here have generally "adopted a sort of middle course,"

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and allowed the truth in "defence only when the further fact appears that the publication was made with good motives and for justifiable ends." Mr. Townshend says that truth is by statute or constitution a defence in Kansas, Louisiana, Maryland, Virginia, Connecticut, Georgia, Indiana, Mississippi, Missouri, New Jersey, North Carolina, Tennessee, Vermont, and District of Columbia, New York, Rhode Island, Pennsylvania, Minnesota, Florida, and we find that it is made admissible by constitution in Alabama, Arkansas, California, Colorado, Delaware, Illinois, Kentucky, Maine, Michigan, Montana, Nebraska, Ohio, South Carolina, Texas, West Virginia, Wisconsin, and Wyoming. Some constitutions allow the evidence without regard to the motive of the publication, and some explicitly make the jury judges of the law as well as the fact.

Mr. Bishop attributes the modern change of doctrine on this subject to the rise of newspapers. He says: "In the early periods, when the law was receiving its shape from the pressure of outward needs, the newspaper was unknown. Then a written statement by one of an unwelcome truth concerning another did no good since it did not reach the eyes of the public. But it did tend most powerfully in a semi-barbarous condition of society, to stir up the hot blood of the person against whom it was made. Wisely, therefore, did the Courts in those circumstances forbid the defendant indicted for a libel to rely on its truth in defence. Now all is changed. Our prisons and the gallows itself must be deemed in some respects subordinate to the mightier power of the press, as correctives of the social wickedness of men. Many a wretch has felt the keen exposure of his villany, when voiced from the million-tongued printed page, as no mortal ever felt the sentence bidding him mount the gallows and be hanged. Therefore a different rule should govern this question of libel now, from the one which properly governed it centuries ago."

As to pleading the truth in civil actions, Mr. Townshend says (Slander and Libel, sect. 211). "It is now almost universally conceded that to show the truth of the matter published is a complete defence to an action either of slander or libel." But he adds that the rule "appears to be an innovation, and of comparatively modern introduction," the truth being anciently regarded only in mitigation of damages.

As to the origin of the maxim, the greater the truth the greater the libel, Mr. Townshend makes some interesting observations (Slander and Libel, sect. 211, note), accompanied by quotations from Burns and Tom Moore.

The doctrine has been very little drawn in question recently in the courts, but in *Castle v. Houston*, 19 Kansas, 417; 27 Am. Rep. 127 (1877), a civil action, it was held that under the constitution of that State, evidence that the matter charged was true did not merely tend to mitigate damages, but was a complete defence in a civil action for damages, although on a criminal prosecution the accused may not be acquitted without proof that the publication was with good motives and for justifiable ends. (See *Lanning v. Christy*, 30 Ohio State, 115, 27 Am. Rep. 431.

No. 1. — Lannoy v. Werry. Abbott on Shipping, 5th ed. 184. — Rule.

DEMURRAGE.

No. 1. — LANNOY *v.* WERRY.

(1717.)

No. 2. — JAMIESON *v.* LAURIE.

(1796.)

RULE.

THE payment of demurrage stipulated to be made while a ship is waiting for convoy ceases as soon as the convoy is ready to depart; and such payment, stipulated to be made while a ship is waiting to receive a cargo, ceases when the ship is fully laden, and the necessary clearances are obtained, although the ship may in either case happen to be further detained by adverse winds or tempestuous weather (Abbott on Shipping, 5 ed. p. 183).

Lannoy v. Werry.

Abbott on Shipping, 5th ed. pp. 184-186 (s. c. 4 Bro. P. C. 630).

Demurrage. — Charter-Party. — Waiting for Convoy.

[184] Two ships, the *Swallow* galley and the *Beak* galley, were hired by charter-party, for a voyage from Leghorn to several ports in the Mediterranean, and from thence to London, and it was stipulated, that after receiving their cargo at the ports in the Mediterranean, they should sail directly for Gibraltar, and there remain until some convoy should then next present from thence, bound either for Lisbon or England, and sail with such convoy either for Lisbon or London, and if the convoy should not proceed directly for England, should remain at Lisbon until some convoy should present from thence for England, and then sail with such convoy; and if the convoy should not go into the Downs, then they should wait at the first port they should make in England, for con-

No. 1. — *Lannoy v. Werry, Abbott on Shipping, 5th ed. 184, 185.*

voy from thence to the Downs: and the merchants covenanted to pay in London, £6 per day for the *Swallow*, and £7 per day for the *Beak*, for each day that they should wait for convoy at Gibraltar, Lisbon, or elsewhere during the voyage, above the space of twenty days in the whole, during which twenty days they were to lie at the charge of the commanders. The ships having received their lading, sailed for Gibraltar, and arrived there on the 11th of March, 1708. On the 25th of September, Sir John Leake passed by Gibraltar, but refused to take them under his convoy, having appointed Captain Moody for that purpose. On the 27th of September, Captain Moody arrived at Gibraltar, * and [* 185] staid there till the 6th of October, on which day the ships, after having waited 148 days, sailed with him for Lisbon, arrived there with him on the 16th of the same month, and staid with him there till the 14th of November, and then sailed with him for England, and arrived with him at Falmouth on the 2d of December; and there the two ships waited till the 17th of January, when they sailed from thence, and joined Captain Moody at Plymouth, he having previously left Falmouth, and put into Plymouth, and sailed with him to the Downs; and ultimately arrived in safety at London. Part of the delay of the two ships at Falmouth, and of Captain Moody at Plymouth, was occasioned by tempestuous weather. The masters claimed demurrage for the whole period of the several detentions after the first twenty days. The merchants insisted that nothing was due for the time they waited, after Captain Moody joined them: and indeed at first insisted, that they ought to have sailed with Sir John Leake, but this was held to have been impossible. The Lord Chancellor COWPER, declared, that demurrage was payable both during the time that the ships waited for the arrival of convoy, and during the time that the convoy was not ready to sail; for if the convoy was not ready or able to sail at any time when the ships, were both able and ready, the staying of the ships for the convoy, was the same thing as if no convoy was near at hand; but that no demurrage ought to be allowed while the ships and their convoy staid for want of wind, or were detained by contrary winds; and upon this principle it was ultimately decided by the LORD CHANCELLOR, and afterwards by the House of Lords upon appeal,¹ that demurrage should not be paid for such portion of the

¹ The only alteration of the CHANCELLOR'S decree made in the House of Lords, was in the number of days, for which demurrage should be paid at Falmouth.

detention at Falmouth as was thought properly attributable to the weather, but that it should be paid for all the rest of [* 186] *the time that the ships had waited there, and for the whole period of their stay at Lisbon and Gibraltar, after the expiration of the first twenty days.

Jamieson v. Laurie.

Abbott on Shipping, 5th ed. pp. 186-188 (s. c. 6 Bro. P. C. 474).

Demurrage. — Waiting for Cargo.

Jamieson & Co., merchants at Leith, having contracted with Atkins & Co., merchants at St. Petersburg, for a quantity of tallow, which, as the latter represented, would be ready for delivery in the beginning of August, sent the ship *Bell*, whereof John Lawrie was owner, and one Anderson master, to Cronstadt, under the following letter of instructions delivered to the master, which was the only evidence of the contract between the parties. "You will on your arrival at St. Petersburg, deliver our inclosed letter to Messrs. Atkins, E. Rigail, & Co., to whom we address your ship the *Bell*. They will ship 100 tons of tallow, and get you what deals and battens you may want to fill up your ship — you have a provisional order to Messrs. G. Scougal & Co. for 40 tons of iron, to Messrs. S. & R. Anderson; if they cannot ship it in time, you may apply to Messrs. Hill, Cazalett, & Co. to whom you have a letter; failing them, you may make inquiry through the factory, and if you can't get any, you'll directly load without it. Observe, you must get clear and sail before the 1st September N. S., as the premiums of insurance advance greatly after that date. About this we wrote particularly to Messrs. Atkins, E. Rigail, & Co., and we hope they will attend to it. We have no objection to your taking any goods on freight to the extent of 50 or 60 tons, but the ship must not be detained for them: and with respect to deals, you will be at great pains in wracking them."

The ship arrived at the port of destination on the 22d of July, 1787, and the master applied to Atkins & Co. according to the instructions. They informed him that the tallow, which was to come by water from the interior of the country, could not [* 187] be expected till towards the end of August: *and in fact, on account of the dryness of the season, which

No. 2. — *Jamieson v. Laurie, Abbott on Shipping*, 5th ed. 187, 188.

retarded the inland navigation, it did not arrive at St. Petersburg till October, and was not shipped till near the end of that month. The master made a protest against the merchants for not loading the ship by the first of September; but waited for the tallow by the directions of Atkins & Co., and, as it seemed, under an opinion that he was bound to do so. The lading was completed, and the ship's clearances obtained on the 28th of October, and the ship, having waited a few days for a wind, sailed out of the mole of Cronstadt, but soon meeting with adverse winds and frost, was forced to return to Cronstadt, and was there frozen up, and remained until the 11th of May. The winter began earlier than usual. Upon the arrival of the ship and delivery of the cargo at Leith, the owner claimed of Jamieson & Co. freight at the usual rate for the voyage, demurrage from the first of September till the 11th of May, and an indemnification against a claim made upon him by another merchant, for whom he had shipped some flax soon after the arrival of the vessel at Cronstadt, for damages occasioned by the delay in bringing the flax to Leith.

The case was litigated in several courts in Scotland, and was at last brought by appeal to the British House of Lords. It was admitted on both sides, that the master might by law have returned empty, or have obtained another cargo after the first of September, but the owner of the ship contended, that as the master had waited at the request of the correspondents of Jamieson & Co. they were answerable for all the damage arising from that delay.

The House of Lords decided that Jamieson & Co. should pay only the usual freight, and a compensation in the nature of demurrage for the period between the 1st of September and the 29th of October. This decision was conformable to one of the determinations, which had taken *place in Scotland, and [* 188] also to the usage of trade, as represented by several merchants in London, who had been examined in the cause, and who deposed, that the claim of demurrage ceased as soon as a ship is cleared out and ready for sailing.

No. 3. — *Brown v. Johnson.* — Rule.

ENGLISH NOTES.

In *Connor v. Smythe* (1814), 5 Taunt. 654, 1 Marsh. 276, the charter-party contained a covenant by the owner that the ship should take a cargo at a port and proceed with the first convoy that should sail fourteen working days after she was ready to load; and the merchant covenanted to load and dispatch her within fourteen days after notice that she was ready to load, with liberty, however, to detain her fifteen running days after the expiration of the fourteen, paying four guineas per day demurrage. The first convoy sailed after the fourteen and before the fifteen days expired. There was no other convoy for nearly two months after the first. It was held that the owner could recover the stipulated demurrage, but not compensation for the detention beyond the fifteen days, the parties being in the same condition at the end of the fifteen days as they would otherwise have been in at the end of the fourteen days.

AMERICAN NOTES.

The principal cases are cited in 1 Parsons on Shipping, pp. 315, 317, observing: "And if principles assumed to be law in the modern cases are to be adopted, we should say that delays from the elements, as frost, or tempest, or tides, . . . should give claim to demurrage." "But if the detention occur after the vessel is loaded the charterer will not be liable." No American cases to the point are cited. In *The Onrush*, 6 Blatchford (U. S. Circ. Ct.), 533, it was held that forcible detention by military officers of the government excused the failure to sail on a certain day.

No. 3. — *BROWN v. JOHNSON.*

(EX. 1842.)

No. 4. — *THE STEAMSHIP COMPANY "NORDEN" v. DEMPSEY.*

(C. P. 1876.)

RULE.

WHERE a certain number of days (called lay-days) are allowed for discharging at a destined port, the ship is arrived for the purpose of the lay-days beginning to run as soon as she is at the usual place of discharge within the port.

No. 3. — *Brown v. Johnson*, 10 M. & W. 331.

In the absence of a special custom of the port, a ship is at its usual place of discharge when she has entered the dock, and is given in charge of the dock officer. But by the custom of the port the usual place of discharge may be narrowed to the wharf or quay where cargo of the description carried is usually discharged; and in that case the ship is not arrived until she is moored at such wharf or quay.

Brown v. Johnson.

10 Meeson & Welsby, 331-334, (11 L. J. Ex. 373.)

Demurrage. — Charter-Party. — Lay-Days.

By a charter-party made in London, upon a vessel for a voyage from [331] London to Honduras and back to some port in the United Kingdom, 25 running days for every 100 tons of mahogany were to be allowed for loading the ship at Honduras, and 15 days for discharging at the destined port in the United Kingdom, — *Held*, that in the absence of any custom, Sundays were to be computed in the calculation of the lay-days at the port of discharge.

The ship arrived at Hull, the port of her destination, on the 1st of February, and was reported; on the 2nd, she entered the dock, and was given in charge of the dock-officer, but did not get to the place of unloading till the 4th, in consequence of the full state of the docks, the officer refusing to take her out of her turn; and the discharge was not completed till the 22nd. — *Held*, that the lay-days were to be calculated from the period of her arrival in dock, and not at the place of unloading.

Declaration by the plaintiff, as owner, against the defendant, as charterer, on a charter-party of the ship *Trinidad*, from London to Honduras, there to load at one of the usual places of loading, including the rivers Ulna and Dulce, a cargo of mahogany, and then proceed to some port in the United Kingdom; twenty-five running days for every hundred tons of mahogany to be allowed the defendant, if the ship were not sooner dispatched, for loading the said ship at Honduras, and fifteen days for discharging at her destined port in the United Kingdom, and thirty days on demurrage, over and above the said laying days, at £6 per day. Among other breaches, the declaration alleged, that the ship being ordered to Hull upon her return, by the defendant, he would not discharge the cargo at the said port of Hull within the said number of fifteen days in the charter-party mentioned, but detained the vessel after

she was ready to discharge her cargo, and the defendant had notice of it, for the space of six days over and above the said fifteen laying days mentioned in the said charter-party, whereby a demand for demurrage arose.

To this the defendant pleaded, amongst other pleas, that he did not detain the vessel above the said fifteen laying days, in the said charter-party in that behalf mentioned; and also, that he was prevented from unloading by the wrongful act, procurement, neglect, and default of the plaintiff, and his servants and agents; whereupon issues were joined.

At the trial before ALDERSON, B., at the Sittings in London [* 332] don * in this term, it appeared that, the charter-party having been entered into in London, the ship proceeded on her voyage, and arrived with her cargo at Hull, the port of destination, on the 1st of February, 1841, and was reported. On the 2nd she entered the dock, and was given in charge of the dock officer. but did not get up to the place of unloading till the 4th, in consequence of the full state of the docks, the dock officer refusing to take the ship out of her turn, and the discharge was not completed till the 22nd. The defendant's counsel called several witnesses to prove that, by the usage of the trade at Hull, the word "days" meant "working days;" but this they failed to establish. There was evidence that the plaintiff had been dilatory and negligent in the unloading; and the learned Judge, in his summing up, directed the jury, that the period from which the lay-days was to commence was the day of her coming into the dock, and not of her coming to her berth, and that Sundays were to be included in the lay days. The jury found a verdict for the plaintiff for £18 for demurrage, declaring that they had included Sundays in their computation of the time allowed for unloading.

Jervis now moved for a new trial on the ground of misdirection, on two points. — First, Sundays ought not to have been included in reckoning the lay-days. This was evidently the intention of the parties, from their making a distinction between running days and lay-days. It may be assumed that the parties contemplated that nothing could be done in England on a Sunday for the purpose of discharging the cargo, as it would be contrary to law. This charter-party was entered into in London; and in *Cochran v. Retberg*, 3 Esp. 121, where there was a clause in the bill of lading that the cargo should be taken out in a certain number of days, it

was found that, by the usage of * trade in the city of Lon- [* 333] don, the term “days” means only working days, not running days. And in *Abbott on Shipping*, p. 180, 5th ed., it is laid down thus: “The word ‘days,’ used alone in a clause of demurrage for unloading in the river Thames, is said to be understood of working days only, and not to comprehend Sundays or holidays by the usage among merchants in London,” for which the author cites *Cochran v. Retberg*: undoubtedly he adds that it is better to mention working or running days expressly. The object for making a distinction between the days to be counted at the port of loading and that of discharge must be apparent to every one. At the former there is no prohibition against working on Sundays, and the owners are at a greater expense, the ship at the time of loading having her full complement of men; whereas, at the port of discharge, a prohibition as to working on Sundays does exist, and her discharge could not proceed on that day; the crew, likewise, would be discharged, and only lumpers, who would receive no wages for that day, would be employed. Secondly, the lay-days ought not to have been calculated from the time when the ship got into dock, and into the conduct of the dock officers, but only from the time when she got to her berth in the dock. The lay-days are stated to be for “discharging,” which means fifteen days which can be employed for that purpose. Here there was no possibility of unloading the vessel until the 4th, when she got to her place of unloading, and the days ought not to have been calculated before that time. In *Brereton v. Chapman*, 7 Bing. 559, 5 Mo. & P. 526, it was held that the lay-days allowed by a charter-party for a ship’s discharge were to be reckoned from the time of her arrival at the usual place of discharge, and not at the port merely. Here the days might just as well have been reckoned from the time of entering * the port. — [ALDERSON, B. [* 334] I acted upon the authority of *Randall v. Lynch*, 12 East, 181 (11 R. R. 340), and *Brereton v. Chapman*, and said that the period ought to commence from the time the ship came into the dock, and was in charge of the dock officer, who would not take her out of her turn: the delay which then arose was inevitable, and neither party was in fault. I think some stipulation ought to have been made against such an accident, if those days were not to be counted. I did not say that they were chargeable from the entry into the port of Hull, but from the time of her coming

No. 4. — The Steamship Company "Norden" v. Dempsey, 1 C. P. D. 654.

into dock. If the place in the docks is the point, I was wrong; if the dock, I was right.]

LORD ABINGER, C. B. My opinion is, that the lay-days under this charter-party commenced from the time of the vessel's coming into dock; it had then arrived at its usual place of discharge. They certainly did not commence at the period of its entering the port, as that might be very extensive; for instance, Gravesend is part of the port of London. Then, with respect to the days, I think the word "days" and "running days" mean the same thing, viz. consecutive days, unless there be some particular custom. If the parties wish to exclude any days from the computation, they must be expressed.

The rest of the Court concurred.

Rule refused.

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1 C. P. D. 654-663 (s. c. 45 L. J. C. P. 764; 24 W. R. 984).

Demurrage. — Charter-Party. — Lay-Days. — Local Custom.

[654] Timber was consigned, under a charter-party made at Riga, to the Canada Dock in the port of Liverpool, a given number of days being allowed for unloading there:—

Held, that, by the general law, the lay-days commenced from the time the ship arrived in the dock; but that it was competent to the consignee to show, notwithstanding the plaintiff was a foreigner, that there was a custom in the port of Liverpool, that, in the case of timber ships, the lay-days commenced only from the mooring of the vessel at the quay where by the regulations of the dock she was alone allowed to discharge.

Action for demurrage upon a charter-party and bills of lading made at Riga, in the following terms:—

It is this day mutually agreed between the undersigned F. H. Holm, merchant of this town, on the one part, and C. Michelsen, master of the steamship *Patmona*, on the other. — That the said ship, being tight, staunch, and every way fitted for the voyage, and being also provided with the necessary ship's documents, shall receive and load from the merchant a full and complete cargo and deck-cargo, not exceeding what she can reasonably stow and carry, consisting of square half fir sleepers, and, being so loaded, shall with all convenient speed proceed from Mühlgraben to Liverpool, or so near thereunto as she may safely get, to deliver there the said cargo always aloft, according to the tenor of the bills of lading. After due delivery of the same in good order and well conditioned (all dangers and accidents of the seas and rivers,

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&c., excepted), the receivers shall pay to the captain or to his order for freight for each load of 50 cubic feet, customs' calliper measure, square half sleepers, 17s. 6d. British sterling; deck-cargo to pay full freight; captain to receive £5 sterling in gratuity; all in sterling money of Great Britain; one half in cash, and remainder in approved bills on London at three months' date, or less bank discount at captain's option, without any delay or deduction whatsoever. The cargo is to be loaded and discharged together in ten working days, or for every day longer detained the captain to receive demurrage at the rate of £40 sterling per day; and to be delivered here alongside of the vessel, and at port of delivery to be taken from alongside free of expense to the ship.

Steamer to be free of address at port of discharge, but to be cleared at the custom-house, Riga, by P. Bornholdt, on usual terms. Sufficient cash for ship's disbursements to be advanced on account of freight, on usual terms. The ship is expected discharged at Surnimünde on the 25th of August instant. A commission of 2 per cent. on amount of freight is due by the ship on signature of this agreement to P. Bornholdt & Co. And, for the due performance, &c.

Dated at Riga, this 12th/24th day of August, 1875.

* In the margin was the following memorandum:— [* 655]

Discharging dock to be ordered on arrival of steamer at Liverpool. Steamer to clear at Liverpool by R. Heyn, jun., paying usual reporting fee only.

The sleepers were shipped under two bills of lading. The first was as follows:—

Shipped in good order and well conditioned by F. H. Holm, in and upon the good ship called the *Pamona*, S. S., whereof is master for the present voyage C. Michelsen, and now riding at anchor in the river of Riga, and bound for Liverpool to such dock as ordered on arrival, 8125 red wood sleepers of $5 \times 10 \text{ } 8\frac{1}{2}$ feet long, being marked and numbered as in the margin, and are to be delivered in like good order and well conditioned at the aforesaid port of destination (the act of God, &c., expected), unto order or assigns, he or they paying freight for the said goods, and all other conditions as per charter-party, with primage and average accustomed. Dated in Riga the 18/30 August, 1875.

In the margin were these words, “Two days expended in loading this parcel.” The second bill of lading, dated “Riga, the 21 August, 2 September, 1875,” was in the like terms, but for 12,801

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sleepers; and in the margin were these words, — "Three days expended in loading this parcel. For discharging the whole cargo at Liverpool are left five days."

The cause was tried before LUSH, J., at the last winter assizes at Liverpool. The facts were as follows: The plaintiffs, ship-owners at Copenhagen, by the instrument above set out chartered the *Pamona* to carry a cargo of railway sleepers from Riga to Liverpool. The sleepers consisted of two parcels, one of which (consisting of 12,801 sleepers) was consigned direct to the defendant, a timber-merchant at Liverpool, he being also assignee of the bill of lading of the other parcel, consisting of 8125 sleepers. The *Pamona* left Riga on the 2nd of September, arrived in the Mersey on Sunday, the 12th, and got into the Canada Dock (one of the the two docks in the port of Liverpool where timber-ships are usually unladen), to which she was ordered on arrival, on the 13th, but, by reason of the crowded state of the dock, she did not get a berth at the quay where the unloading was by the regulations of the dock to take place until the 17th; and she commenced unloading on the 18th, and finished on the 23rd.

The plaintiffs claimed demurrage from the expiration of five days after the *Pamona* got into the Canada Dock. The defendant, on the other hand, sought to show that there was a custom in the port of Liverpool that in the case of timber-ships the lay-[* 656] days * commenced only from the mooring of the vessel at the quay where she was alone allowed to discharge, and not from the time of her entering the dock. Thus, according to the plaintiff's contention, the ship should have been discharged by Saturday, the 18th, instead of the 23rd.

The following question was put by the defendant's counsel to one of his witnesses, — "Is there any usage in the timber-trade at Liverpool as to when the lay-days commence?" This was objected to by the plaintiff's counsel, and the objection was allowed. The question was repeated in a slightly varied form, and again objected to and rejected. It was finally put thus, — "Is there any custom in the port of Liverpool, with regard to ships in the timber-trade, as to when they are deemed to have arrived at their usual place of discharge?" This also was objected to, and was rejected by the learned Judge, on the ground that the alleged custom was too limited, being confined to a particular trade and to vessels bringing a particular description of cargo.

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A verdict having been found for the plaintiff,

Jan. 13. Herschell, Q. C., obtained an order *nisi* for a new trial on the ground of improper rejection of the evidence tendered as to the alleged custom, or (pursuant to leave reserved) to reduce the damages.

May 5, 8. Cohen, Q. C., and Edwards, Q. C., showed cause. The conditions of the charter-party being incorporated in the bills of lading, the plaintiffs were entitled to demurrage from the expiration of the lay-days, which commenced on the arrival of the ship in the Canada Dock, the voyage being then completed: *Randall v. Lynch*, 2 Camp. 352; 12 East, 179 (11 R. R. 340, 727); *Brown v. Johnson*, (p. 201, *ante*) 10 M. & W. 331, 11 L. J. Ex. 373; *Kell v. Anderson*, 10 M. & W. 498, 12 L. J. Ex. 101; *Tapscott v. Balfour*, (1872) L. R., 8 C. P. 46; 42 L. J. C. P. 16, 27 L. T. 710, 21 W. R. 245. The defendant sought to prove a local custom by which, it was said, the lay-days commenced, not from the arrival of the ship in the dock, but from the time of her being moored at the quay appropriated by the regulations of the dock for the unloading of such a cargo. This evidence was objected to upon several grounds. In the first * place, because it was an attempt to contradict [* 657] or vary the terms of the contract which the parties had entered into. In the next place, this being a foreign charter-party, and the ship-owners a foreigner company, they could not be bound by a local custom of which they could not be assumed to be cognisant. *Hathesing v. Laing*, L. R., 17 Eq. 92, 43 L. J. Ch. 233; *Kirchner v. Venus*, 12 Moo. P. C. 361, 399. Further, the alleged custom has reference, not to the port of Liverpool generally, but to a particular part of the port, and to a particular trade. The only ground upon which evidence of custom is admissible is, that the parties must be taken to have known and to have intended to contract with reference to it: per BLACKBURN, J., in *Robinson v. Mollett*, L. R., 7 C. P. 84, 103; and see 1 Duer on Insurance, p. 258 where it is said, "It is to be collected from the decisions that in these cases a usage that can alone be allowed to control the interpretation of the policy, or vary the legal rights of the parties must be general, uniform, notorious, reasonable, and consistent with the terms of the policy, and to a certain extent with the rules of law."

May 9. Herschell, Q. C., and T. H. James, in support of the order. The question in its last form was clearly admissible:

its tendency was not to contradict or to vary the terms of the charter-party. It was the duty of the ship-owners to bring the ship to the dock to which she was ordered in the port of Liverpool. It was open to the defendant to show that by the custom of the port Liverpool does not mean the port of Liverpool generally, or a particular dock only, but a particular part of the dock assigned to ships in a given trade. In *Kell v. Anderson*, 10 M. & W. 498, 12 L. J. Ex. 101, the charter-party was for a voyage from Newcastle to London; and Lord ABINGER said (10 M. & W. at p. 502): "The days of demurrage must be counted from the time of the arrival of the vessel at the place of discharge according to the usage of the port." PARKE, B., goes further, and says: "It appears to me that the question in this case is one of fact, viz., at what time the vessel arrived at her place of discharge according to the usage of the port of London for such vessels." That case is a strong authority for the defendant. This point was not [* 658] raised in *Tapscott v. Balfour*, L. R., 8 C. P. 46. *The circumstance of the charter-party being made abroad, or of one of the parties to it being a foreigner, makes no difference.

Cur. adv. vult.

May 20. Lord COLERIDGE, C. J. This was a motion for a new trial, on the ground of improper rejection of evidence tendered on the part of the defendant at the trial. The question arose thus:—The ship *Pamona* was chartered at Riga for the conveyance of a cargo of railway sleepers to Liverpool, consigned to the defendant. The charter-party contained (amongst others) this stipulation, — "The cargo is to be loaded and discharged together in ten working days, or for every day longer detained the captain to receive demurrage at the rate of £40 sterling per day." In the margin of the charter-party were these words, — "Discharging dock to be ordered on arrival of steamer at Liverpool." The *Pamona* arrived in the Mersey on Sunday, the 12th of September, 1875, and was ordered to the Canada Dock, that being one of the docks where timber-ships are usually unladen. She got into the dock on the 13th, but, by reason of its crowded state, she did not get a berth at the quay where the unloading was to take place until the 17th. She commenced unloading on the 18th, and finished on the 23d. By memoranda on the two bills of lading, it appeared that five of the ten lay-days had been expended in loading the sleepers at Riga,

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and consequently there remained only five days for unloading at Liverpool. The question was, when did those days commence; whether from the ship's arrival in the Canada Dock, or from her being moored at the quay-berth at which alone she could discharge her cargo,— in other words, at what time could it be said that the ship under the terms of this charter-party arrived at Liverpool.

Now, it is plain upon principle, and upon authority also, if authority were wanted, that, where the lay-days are to commence running "on arrival" at the ship's port of discharge, evidence may be given to show what is commonly understood to be the port. Some ports are of large area, and by custom "arrival" is understood to mean arriving at a particular spot in the port. That has been held as to the ports of London, Hull, Antwerp, and many others. The port of Liverpool, as we all know, is of many * miles extent, with a series of docks for different [* 659] classes of ships and trades. It cannot be denied that, if any question arose upon it, it would be perfectly legitimate to receive evidence to show that arrival "in the port of Liverpool" did not mean arriving at the mouth of the Mersey. Here, the vessel was shown to have arrived at the Canada Dock on a certain day. It was sought to carry the doctrine of expanding documents by parol evidence further, and to show that, in the case of a timber-ship, those words were not satisfied by arrival in the dock, but that the ship must have reached an unloading berth at the quay. If that were so, the verdict would be wrong, and the defendant would not be liable. But, if arrival in the dock itself be enough, under the terms of this charter-party, the plaintiff is entitled to retain his verdict. At the trial, the defendant's counsel proposed to put certain questions for the purpose of showing that, according to the custom of the port of Liverpool, a vessel arriving with a timber cargo was not to be considered as having arrived at her place of discharge until she had got a berth and quay space to unload in. The question first put was this, — "Is there any usage in the timber-trade at Liverpool as to when the lay-days commence?" That was objected to, and rejected by the learned Judge, and the rejection was acquiesced in. The question was repeated in a modified form and again rejected. It was finally put thus, — "Is there any custom in the port of Liverpool, with regard to ships in the timber-trade, as to when they are deemed to have arrived at their usual place of discharge?" That question

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was carefully considered, but the learned Judge rejected it, on the ground that the alleged custom was too limited, being confined to a particular trade and to vessels bringing a particular description of cargo. I am of opinion that the question in that shape and at that time ought to have been allowed to be put, and that its rejection is ground for a new trial. Principle and authority have alike decided that, where the question is what particular part of an extensive port a vessel must have reached before she can be said to have arrived at her destination, evidence may be given as to the usage of the port in that respect. Such evidence has been allowed by Judges, and the propriety of receiving it has [* 660] upon many occasions * been recognized by the Courts, upon the ground that it is not offered for the purpose of contradicting but merely to explain the contract. If by the usage of the port arrival means coming to a particular spot in the port, evidence has always been allowed to show that. The question in substance was, what, according to the custom of Liverpool, is the place of arrival of a timber-ship coming to that port? The contract must be taken to have been made with reference to the usage of the port. This is but going another step in the same direction. We have been pressed with the authority of cases in which it has been held (or assumed), and rightly, in the absence of such evidence as this, that arrival in port, as a general rule, means arrival in the docks, if docks there are. *Brown v. Johnson* and *Kell v. Anderson* were cited for that purpose. Those cases are good authority for that proposition: but they are no authority against the proposition which the defendant contends for here. There is no case to be found in which evidence of a usage such as this has been rejected: and I see no principle for its rejection. Perhaps the nearest approach to an authority is the *dictum* of Lord ELLENBOROUGH in *Randall v. Lynch*: but the circumstances of that case were totally different: the agreement of the parties fix the period for the commencement of the lay-days, viz., the day the ship was reported at the Custom House. Without saying what would have been the result had the question been allowed, it appears to me that the case was stopped too short. I think there should be a new trial.

BRETT, J. This is an action against the consignee of a cargo of sleepers; the defendant being the holder of a bill of lading which described the vessel to be "bound for Liverpool to such dock as ordered on arrival," and the goods to be deliverable "at the afore-

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said port of destination unto order or assigns, he or they paying freight for the said goods and all other conditions as per charter-party." The charter-party was made at Riga. The ship was to proceed from Mülhgraben to Liverpool, or so near thereto as she * might safely get, to deliver there the cargo always [* 661] afloat according to the tenor of the bills of lading. The charter-party contained the following clause: "The cargo is to be loaded and discharged together in ten working days, or for every day longer detained the captain is to receive demurrage at the rate of £40 sterling per day; and to be delivered here alongside of the vessel, and at port of delivery to be taken from alongside, free of expense to the ship." In the margin of the charter-party was the following memorandum, — "Discharging dock to be ordered on arrival of steamer at Liverpool." The ship arrived at Liverpool on the 12th of September, 1875. There are two docks in the port of Liverpool in which timber ships are unladen, viz., the Canada Dock, and the Brunswick Dock. The vessel in question was ordered to the former of these docks, and she arrived there on the 13th; but she could not for some days obtain a quay berth. It must be taken that a cargo of this description is not allowed to be unloaded in the Canada Dock except at a quay berth. The question was, whether the lay-days were to be counted from the arrival of the ship in the Canada Dock or only from the time of her getting to a berth alongside the quay. The defendant's counsel proposed to ask this question, — "Is there any custom in the port of Liverpool, with regard to ships in the timber-trade, as to when they are deemed to have arrived at their usual place of discharge?" This was for the purpose of obtaining information, — to show that timber-ships in the Canada Dock are not allowed to commence unloading until they get a quay berth, and that by the usage of the port the lay-days reckon only from that time. The question was objected to, and was disallowed. Upon showing cause against the order for a new trial upon the ground that the question was improperly disallowed, it was argued by Mr. Cohen that the question was inadmissible, for several reasons. In the first place he contended that, upon the true construction of this charter-party, the tendency of the proposed question was to contradict the contract, for that, by reason of the marginal entry, the final destination of the ship was a dock to be named, and therefore the place of arrival was the Canada Dock,

the dock to which the ship was ordered on reaching the Mersey; and that to allow a question as to a custom of the port for [* 662] * interposing a particular part of that dock as the place of arrival, would of necessity contradict the words of the charter-party. He then argued that, assuming the question to be admissible and proper if the charter-party had been a Liverpool charter-party, it could not be so in this case because the charter-party was made at Riga. He further argued that, even though an Englishman might be bound by such a custom in the case of a charter-party made abroad, evidence of the custom could not be received where one of the parties to the contract was a foreigner. He further argued that the evidence was inadmissible because it professed to set up a custom of the port of Liverpool as to unloading, not as applicable to the whole port or to all trades, but as applicable to a particular part of the port and to a particular trade only.

As to the first point, whether the proposed question would add to or vary the terms of the charter-party, if that was the effect of it I think it was inadmissible. This charter-party was made at Riga. To attempt to vary it by showing a custom of the port of Liverpool, evidence of which would be admissible only upon the supposition that it was known to both parties to the contract, could not be allowed. I do not accede to the proposition that there is any distinction in this respect where one of the parties to the contract is a foreigner. But I do not think the proposed question has the effect of varying the terms of this charter-party. The contract is, to carry the cargo to Liverpool, a certain number of days being allowed for loading the ship at the port of loading and for unloading her at the place of discharge. Here, Liverpool is the place of discharge. The question therefore is, what is the meaning of "Liverpool"? It is not contended that the vessel arrived at Liverpool the moment she entered the Mersey, but only when she entered a Liverpool dock, — when she had arrived at a place where according to the custom of the port she was considered as an arrived ship. It is then only that the lay-days are to commence. If when she has so arrived she cannot, either by reason of the crowded state of the dock or of the regulations of the dock, commence unloading at once, this will not affect the rights of the ship-owner if she be an arrived ship. If she be an arrived ship when she gets into the Canada Dock, the rights of the

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owner upon *a contract made at Riga cannot be affected [*663] by any regulations of the dock authorities at Liverpool as to the time or mode of unloading. That is settled by *Brown v. Johnson* and *Kell v. Anderson*. *Randall v. Lynch* is no authority to the contrary of what we are now deciding: and I think *Brereton v. Chapman*, 7 Bing. 559, is an authority in support of it. Practically, the very question now objected to was asked there. I think the question was admissible because it was a question tending to solve the fundamental question, when was the ship an arrived ship?

LORD COLERIDGE, C. J. My Brother LINDLEY desires me to say that he concurs in this judgment.

Order absolute for a new trial.

ENGLISH NOTES.

Where the expression "lay-days" or "days" occurs in a charter-party, without qualification, it means, in the absence of any special custom, running or consecutive days. *Brown v. Johnson*, No. 3, p. 201, *supra*; *Niemann v. Moss* (1860), 29 L. J. Q. B. 206, 6 Jur. N. S. 775. An example of such a custom is seen in *Cochran v. Retberg* (1800), 3 Esp. N. P. Cas. 121, according to which, in the port of London, "days" means working days not including Sundays or holidays. The meaning of the expression may also be controlled by the context. *The Commercial Steamship Company v. Boulton* (1875), L. R., 10 Q. B. 346, 44 L. J. Q. B. 219, 33 L. T. 707, 23 W. R. 854. See also *Harper v. M'Carthy* (1806), 2 Bos. & P. (N. R.) 258.

The expression "working days" has been dealt with in several cases. In *This v. Byers*, No. 6, p. 225, *post* (3 Taunt. 387, 12 R. R. 671), it was held that it did not exclude days on which bad weather interfered with the discharge of the cargo. And in *Holman v. Peruvian Guano Company* (1878), Court of Session, Scotland, 4th Series, Vol. 1. 657, it has been held not to exclude days on which loading and discharging in a foreign port could not be carried on on account of the surf, and on which by local custom such work was stopped by order of the captain of the port. See however *Harper v. M'Carthy*, *supra*.

"Running days," like days, or lay-days mean consecutive days: *Nielsen v. Wait* (1885), 16 Q. B. D. 67, 55 L. J. Q. B. 87, 54 L. T. 344, 34 W. R. 33, more fully cited in notes to Nos. 8 & 9, p. 268, *post*.

Where separate periods are allowed for loading and unloading, time saved in unloading cannot be set off against time lost in loading. *Marsshall v. Bolckow* (1881), 6 Q. B. D. 231, 29 W. R. 792.

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Where a certain number of running days are provided, the days mentioned, unless controlled by the context, are calendar days, extending, that is, from midnight to midnight, and not periods of twenty-four hours: and the consignee is entitled to whole days to the number specified. *The Katy* (1894), 71 L. T. 709. But if the ship begins to discharge or completes discharging in the middle of a day, the portion of the day so occupied will be counted as a whole day. *The Katy, supra: The Commercial Steamship Company v. Boulton, supra.* See also *Hough v. Athya* (1879), Court of Session, Scotland, 4th Series, Vol. 6, p. 961.

Where demurrage or dispatch money is to be paid at so much per day, each day will be regarded as a day of twenty-four hours. *Laing v. Holloway* (1878), 3 Q. B. D. 437, 47 L. J. Q. B. 512, 26 W. R. 769.

Where no express time is provided for loading or unloading, the law implies that a reasonable time is intended. *Nielsen v. Wait* (1885), 16 Q. B. D. at p. 70. A reasonable time for loading is not the same as a reasonable time for unloading.

With regard to loading, the merchant must furnish a cargo in a time which is reasonable in *ordinary* circumstances. *Harris v. Dreesman* (1854), 23 L. J. Ex. 210; *Adams v. Royal Mail Steam Packet Company* (1858), 5 C. B. (N. S.) 492, 28 L. J. C. P. 33; *Postlethwaite v. Freeland* (11. L. 1880), 5 App. Cas. 599, 619, 620, 49 L. J. Ex. 630, 42 L. T. 845, 28 W. R. 833.

The merchant will be required to unload, however, in a time which is reasonable in *existing* circumstances; that is to say, he is bound in each case to do his part of the work with reasonable diligence. *Postlethwaite v. Freeland, supra; Burmester v. Hodgson* (1810), 2 Camp. 488, 11 R. R. 776; *Ford v. Cotesworth* (1868), L. R., 5 Q. B. 544, 39 L. J. Q. B. 188, 23 L. T. 165, 18 W. R. 1169; *Hick v. Raymond* (1892), 1893, App. Cas. 22, 62 L. J. Q. B. 98, 68 L. T. 175, 41 W. R. 384; and see *Wright v. New Zealand Shipping Company* (C. A. 1879), 4 Ex. D. 165 n., 169, 40 L. T. 413.

The time to be allowed is also indicated by various indefinite phrases, some of which have been judicially considered. Thus an agreement to load "with the usual dispatch" means with the usual dispatch of persons who have a cargo ready at the dock for loading. *Kearon v. Pearson* (1831), 7 Hurl. & N. 386, 31 L. J. Ex. 1, 10 W. R. 12; *Ashcroft v. Crow Orchard Colliery Co.* (1874), L. R., 9 Q. B. 540, 43 L. J. Q. B. 194, 31 L. T. 266, 22 W. R. 825. And where the ship was "to be discharged with all dispatch as customary" and the discharge was delayed owing to a strike of dock labourers employed by the dock company, which by the custom of the port did the work of discharge for both the owners and the charterers, it was held that the latter were not liable,

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the words meaning that the cargo was to be discharged with all reasonable dispatch having regard to the circumstances and the customary mode of discharging. *Castlegate Steamship Co. v. Dempsey* (1891), 1892, 1 Q. B. 854, 61 L. J. Q. B. 620, 66 L. T. 742, 40 W. R. 533; and where the cargo was to be discharged "with the customary steamer dispatch of the port" but any time lost by strikes was not to count, the latter clause was held to except the charterers from liability in respect of a strike which prevented the steamers from being discharged in the customary manner. *The Alne Holme* (1893), 1893, P. 173, 62 L. J. P. 51, 68 L. T. 862, 41 W. R. 572.

Where a ship was to be discharged as fast as she could deliver at a dock, by the custom of which the work of discharging was done by the dock company acting for both shipowner and charterer, it was held that the customary mode of discharge was implied, and that the charterers were not liable for the company's delay. *The Jaederen* (1892), 1892, P. 351, 61 L. J. P. 89, 68 L. T. 266. Where a charter-party provided that a steamer was to take a cargo to Hamburg "to be discharged at usual fruit berth as fast as steamer can deliver, as customary," it was held that the words "as customary" referred to the speed as well as to the mode of delivery. So that the cargo had to be unloaded as fast as the custom of the port would allow, and therefore that the merchants were not liable for delays caused by the custom. *Good v. Isaacs* (C. A. 1892), 1892, 2 Q. B. 555, 61 L. J. Q. B. 649, 67 L. T. 450, 40 W. R. 629.

A provision that the ship shall load "in the customary manner" does not apply to difficulties in getting the cargo to the place of loading. *Adams v. Royal Mail Steam Packet Co.* (1858), 5 C. B. (N. S.) 492, 494, 28 L. J. C. P. 33; *Tapscott v. Balfour* (1872), L. R., 8 C. P. 46, 42 L. J. C. P. 16, 27 L. T. 710, 21 W. R. 245; *Nelson v. Dahl* (C. A. 1879), 12 Ch. D. 568, 588.

It may here be noted that when a ship is chartered to load at a particular port, the charter-party is to be taken to have reference to the customary mode of loading at that port. *Smith v. Rosario Nitrate Co.* (C. A. 1893), 1894, 1 Q. B. 174, 70 L. T. 68.

The first clause of the above rule is well established, and is recognised expressly or by implication in the ruling cases and the authorities cited below. Thus in *Tapscott v. Balfour* (1872), L. R., 8 C. P. 46, 42 L. J. C. P. 16, 27 L. T. 710, 21 W. R. 245, BOVILL, C. J., says, "The rule is that when a port is named in the charter-party as the port to which the vessel is to proceed, the lay-days do not commence upon the arrival of the vessel in the port, but upon her arrival at the usual place of loading in the port." See also *McIntosh v. Sinclair* (1877), 11 Ir. R. (C. L. 456.

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It may further be noted that where the contract was that the ship should go to "Odessa or as near thereunto as she may safely get," that port consisting of an outer and an inner harbour at each of which there were quays where it was practicable for her to load, and she arrived at a point in the outer harbour where she was as near as she could safely get to a loading berth, but was required to proceed to a quay in the inner harbour where the cargo was stored, the days were held to commence on her arrival in the outer harbour, and not at the quay. *Pyman v. Dreyfus* (1889), 24 Q. B. D. 152, 59 L. J. Q. B. 13, 61 L. T. 724, 38 W. R. 447.

The statement that (in the absence of a custom of the port) the usual place of loading is the dock, is supported by the ruling case (No. 3), *Brown v. Johnson*. That case was followed in *Tupscott v. Balfour, supra*, where it was stipulated that the ship should proceed to any Liverpool or Birkenhead dock as ordered by the charterers and there load in the usual and customary manner a cargo of coal at the rate of 100 tons per working day. The charterers directed that she should proceed to the W. Dock at Liverpool at which coal was loaded generally from tips, but not unfrequently from lighters also. She was prevented from getting under the tips for some time after she had entered the dock; yet in an action for demurrage by the owners, it was held that the days commenced at the time of her entering the dock. The rule was also held to apply where the vessel was admitted into the dock as a matter of favour some days before the regulations of the dock authorities admitted of her reaching a discharging berth. *Ducies v. McVeagh* (1879), 4 Ex. D. 265, 48 L. J. Ex. 686, 28 W. R. 143.

"*Norden*" *S.S. Co. v. Dempsey* (No. 4, *ante*) has been selected as the leading authority for the latter clause of the rule. One of the cases there relied upon was *Breerton v. Chapman* (1831), 7 Bing. 559, in which it was decided that the days were to be reckoned from the time of the ship's arrival at the quay, at which by the custom of the port they commenced running, and not at the entrance of the port, though she had there to discharge part of her cargo in order to reach the quay. In *Kell v. Anderson* (1812), 10 M. & W. 598, 12 L. J. Ex. 101, the ship was chartered to proceed to London with a cargo of coal, and five working days were allowed for discharging. On arriving at Gravesend in the port of London she was entered (as sold) for a meter, that being the usual practice, though vessels of small burden, as she was, were occasionally not so entered. She was in consequence prevented from proceeding to the Pool, which is the usual discharging place for colliers, until her turn as a metered vessel. In an action for demurrage it was held that she did not arrive at her place of delivery until she reached

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the Pool. Reference may also be made to *Hillstrom v. Gibson* (1870), Court of Session Cas. 3rd Series, Vol. 8, 463; 3 Mar. Law. Cas. (o. s.) 302, 362; *Nielsen v. Wait* (1885), 16 Q. B. D. 67, 55 L. J. Q. B. 87, 54 L. T. 344, 34 W. R. 33; and *Parker v. Winslow* (1867), 7 El. & Bl. 942, 27 L. J. Q. B. 49.

In some cases it has been held that the owner has contracted himself out of such a custom. *Hayton v. Irwin* (1879), 5 C. P. D. 130, 41 L. T. 666, 28 W. R. 665; *Horsley v. Price* (1883), 11 Q. B. D. 244, 52 L. J. Q. B. 603, 49 L. T. 101, 31 W. R. 786; *Allen v. Coltart* (1883), 11 Q. B. D. 782, 52 L. J. Q. B. 686, 48 L. T. 944, 31 W. R. 841. In this connection reference may be made to the very recent case of *Monson v. Macfarlane* (C. A. 1895), 1895, 2 Q. B. 562, 65 L. J. Q. B. 57, in which the charter-party provided that a cargo of coal was "to be loaded as customary at Grimsby, as per colliery guaranty, in fifteen colliery working days." The customary loading place for colliers at that port was under a "spout" or shoot. The colliery guaranty provided that time was to count from the day following that on which notice of readiness was received. It was held by the Court of Appeal (KAY, L. J., dissenting), that the provisions of the guaranty were incorporated into the charter-party, and consequently that the lay-days began to run from the day after that on which notice was given, and not from the day after that on which the ship might have got under the spout.

The parties may also agree upon a particular wharf or quay, and in that case it will generally be necessary for the ship to arrive there. *Bastifell v. Lloyd* (1862), 31 L. J. Ex. 413; *Strahan v. Gabriel*, cited by Lord ESHER in *Nelson v. Dohl*, p. 235, *post*; *Murphy v. Coffin* (1883), 12 Q. B. D. 87, 32 W. R. 616; *Harris v. Jacobs* (C. A. 1885), 15 Q. B. D. 247, 54 L. J. Q. B. 492, 54 L. T. 61; *The Carisbrook* (1890), 15 P. D. 98, 59 L. J. P. 37, 62 L. T. 843, 38 W. R. 543; *Thursis Sulphur Co. v. Morel* (1891), 1891, 2 Q. B. 647, 61 L. J. Q. B. 11; 65 L. T. 659, 40 W. R. 58; *Good v. Isaacs* (C. A. 1892), 1892, 2 Q. B. 555, 61 L. J. Q. B. 649, 67 L. T. 450, 40 W. R. 629; *Bulman v. Fenwick* (C. A. 1893), 1894, 1 Q. B. 179, 63 L. J. Q. B. 123, 69 L. T. 651, 42 W. R. 326.

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Both principal cases are cited in 5 Am. & Eng. Enc. of Law, p. 547.

"Lay-days, by the general rule, do not commence until the vessel has arrived at the usual place for unloading." 1 Parsons on Shipping, p. 313, citing *Brown v. Johnson*.

The first branch of the rule is laid down, citing the first principal case, in *Gronstadt v. Witthoff*, 15 Federal Reporter, 265 (citing *Sleeper v. Puig*, 10 Benedict (U. S. Circ. Ct.), 181; *Aylward v. Smith*, 2 Lowell (U. S. Circ. Ct.), 192; *Hodgson v. N. H., &c. R. Co.*, 46 Connecticut, 276; 33 Am. Rep. 21; *The Grafton*, Olcott (U. S. Circ. Ct.), 19; *Izco v. Perkins*, 10 Federal Reporter,

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779; *Moody v. Laths*, 2 *ibid.* 608); the second principal case is cited therein at p. 270.

In *Sleeper v. Puig*, *supra*, it is said: "It has been said that 'lay-days by the general rule do not commence until the vessel has arrived at the usual place for unloading.' (1 Parsons Shipping and Admiralty, 313.) But this does not necessarily mean the very place where the cargo is to be discharged, although it is doubtless the duty of the master, where no place of discharge is designated, to proceed to the place to be designated by the consignee or charterer, provided it be a usual and proper place for discharge within the port of destination." Citing *Brown v. Johnson*. "In the present case the vessel appears to have been brought into the usual place of anchorage near the mole, where vessels await their turn for discharging at the mole. . . . I think upon the whole the case is within the rule laid down in *Brown v. Johnson*."

In *Hodgson v. N. H., &c. R. Co.*, *supra*, where the ship was unable to come to any wharf by reason of ice, demurrage was denied. Citing *Aylward v. Smith*, *supra*, to the same effect.

The *Norden case* is cited in Lawson on Usages and Customs, p. 409.

Where it is a custom of the port to unload at an elevator, each vessel awaiting its turn, this custom becomes part of the contract in the absence of express provision. *The Glover*, 1 Brown Admiralty (U. S. Circ. & Dist. Cts.) 166.

In the absence of specific agreement as to the particular place of unloading, or any known custom of the port, the shipper or his agent must be there ready to receive the cargo on notice of arrival. *Wordin v. Bemis*, 32 Connecticut, 268.

A clause of a bill of lading providing for lay-days to commence twenty-four hours after arrival and notice to the consignee, and demurrage for detention thereafter, while requiring the consignee to be ready to receive the cargo at the expiration of twenty-four hours from notice, does not relieve the vessel from being ready to deliver at a safe selected berth which can be safely reached, and the master is responsible for any delay in bringing the vessel to such berth. *Smith v. Lee* (U. S. Circ. Ct. App. 1st C.), 66 Fed. Rep. 311.

A bill of lading by which the vessel promised to deliver coal at a certain port to a consignee carrying on his business upon a coal wharf at such port, is not an express undertaking to deliver at such wharf, where the delivery is to be made to such consignee or his assignees. *Smith v. Lee*, U. S. (Circ. Ct. App. 1st C.) 66 Fed. Rep. 311.

No. 5. — *Leer v. Yates*, 3 Taunt. 387. — Rule.

No. 5. — *LEER v. YATES*.

(1811.)

No. 6. — *THIIS v. BYERS*.

(1876.)

RULE.

WHERE under a contract of affreightment (whether bill of lading or charter-party) a certain number of lay-days are allowed, and a stipulation is made for a certain sum per day demurrage afterwards, there is an implied contract by the person liable on the contract of affreightment, that he will take the risk of any ordinary vicissitudes which may occur to prevent his releasing the ship at the expiry of the lay-days. The principle applies equally to the consignee of goods shipped on general ship under bill of lading, as to the charterer under charter-party; and applies to delay by reason of the conduct of owners of other goods, as well as to the ordinary risks of weather.

Leer v. Yates; Leer v. Cowell; Leer v. Gorst.

3 Taunton, 387-393 (s. c. 12 R. R. 671).

Demurrage. — Delay caused by Strangers.

A general ship took brandies on board, under bills of lading, which [387] allowed 20 lay-days for delivery of the goods in London, and stipulated for £4 per day demurrage afterwards. Certain of the consignees choosing to have their goods bonded, the vessel could not make her delivery at the London docks until 46 days after the 20 days: some of the goods, which were undermost, could not, though demanded, be taken out till the upper tiers were cleared: *held*, that each of those consignees was liable, on a general count for demurrage, to pay the £4 per day for the 46 days.

The plaintiff in each of these causes declared in assumpsit, complaining that the defendant had promised to take out of the plaintiff's ship, within a reasonable time after her arrival, certain brandy which the plaintiff had brought for him to London, but neglected

so to do, whereby his vessel was detained. Another count alleged a promise of the defendant to take out the brandy within a reasonable time after notice to the defendant of the ship's arrival, and the third count was *indebitatus assumpsit* for the use of the ship *Mariana* of Hamburgh, whereof the plaintiff was master, by the defendant retained and kept on demurrage with certain goods on board, for a long time, at the defendant's instance.

The defendants, Yates and Gorst, pleaded the general issue: the defendant, Cowell, paid into Court on the third count the sum of £16, upon a computation of the share which each of the several freighters who had put goods on board must have contributed, in order to make up one sum of £4 per day between them, if all had become liable to demurrage.

[* 388] * Upon the trial of these causes, at Guildhall, at the sittings after Trinity term, 1810, before MANSFIELD, C. J., it appeared that the master of the vessel, which was a general ship, having a British license, had taken on board at Bourdeaux the goods consigned to the several defendants, and also goods for many other consignees, and had signed and delivered to each of the shippers a bill of lading, whereby he acknowledged "the shipping on board the *Mariana* of the goods," (describing them) "to be taken out in twenty days after arrival or to pay four pounds per day demurrage:" the bill of lading limited the master's responsibility by containing the usual exception of "the act of God, the King's enemies, fire, all dangers of the seas, rivers, and navigation, save risk of boats, so far as ships are liable thereto." The *Mariana* arrived in the London docks on the 17th of June. If all the consignees would have paid the duty on their respective goods, the vessel might have been speedily discharged at other licensed wharfs, which were open for that purpose, but they all preferred bonding their brandy, and the quays and warehouses of the dock, at which alone bonded goods could be landed, were at that time so full, that there was not room to receive more goods to be bonded, in consequence of which, and of the number of vessels then waiting to discharge their cargoes, the vessel was detained until the first of September, before the other vessels which lay between the *Mariana* and the quay had been discharged, and before it came to her turn to be unloaded, and to have her cargo received into the warehouses. Eighty puncheons of brandy, which were delivered on that day, lay above the defendant's casks, and their

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goods, therefore, could not in the ordinary course of delivering the ship, be taken out, until the eighty puncheons which lay above them were delivered, although with additional labour in moving the goods they might have been sooner taken out,

* under the inspection of the superintendent of the docks. [* 389]

It was in evidence that the defendant, Cowell, had frequently demanded a delivery of his goods, which was not complied with, the defendant saying it was impossible to get at the casks; and once, in particular, he had obtained an order from the dock company, permitting two casks to be landed upon payment of the duties, but the plaintiff, on application, said, he could not get at them on account of the superincumbent cargo. The defendant, Cowell, had executed a bond for the duties so early as the 22nd August, and the plaintiff admitted that he, Cowell, had made every exertion for landing the goods which depended upon his acts. It did not appear that the defendants, Yates or Gorst, had made any demand of their goods, nor had either of the three paid or offered to pay the duties, without doing which, Cowell's order from the dock company, permitting the delivery, could not have been carried into effect. The jury in each case found a verdict for the plaintiff on the 3d count, with £184 damages, being the amount of demurrage, at £4 per day, for 46 days, the time which had elapsed from the 7th of July, when the 20 days allowed for delivery of the cargo expired, to the 7th of September, on which day the last of the defendant's casks were taken out. The judge reserved liberty for the defendants to move to reduce the verdict.

Lens, Serjt., in Michaelmas term, 1810, obtained rules *nisi* to set aside these verdicts and enter nonsuits: he moved, upon the ground that a general claim for demurrage arises only in the case, where the delay; whether caused by the act of the defendant, or not, has been beneficial to, and occasioned in the service of the defendant. The delay which had arisen from the extent of the commerce of the country, co-operating with the law which restricted the place of delivery of these goods to the *London [* 390] docks only, was a misfortune, which fell with equal hardship on the plaintiff and on the defendant; but it did not render the defendant answerable to the plaintiff for the consequences.

Shepherd and Best, Serjts., in this term showed cause. The plaintiff does not found this action upon any misfeasance or non-feasance of the defendant. The bill of lading contains evidence

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of a contract to pay demurrage if the ship be detained beyond a certain number of days, from what cause soever that detention may arise, and of the rate at which that demurrage is to be compensated. There is nothing illegal in making such a contract, and the Court cannot inquire into the prudence or imprudence of it. It may be presumed that the plaintiff foresaw that this port was overloaded with imports, and therefore previously stipulated, that if his vessel was not discharged within a certain number of days, he should be paid for his further detention, whatever might be the cause of it. And as such a contract may subsist, so there is no reason why the plaintiff may not under such a contract recover, on a general count for demurrage, upon the evidence of the bill of lading, in like manner, as in an action for goods sold and delivered, he may recover on the evidence of a contract for the sale of the goods at a particular price. Wherever a contract has been executed the sum due on that contract may be recovered on a general count. As to the supposed unreasonableness of this contract, the number of persons who may choose to enter into similar contracts with the defendant cannot affect the case: the compensation agreed to be paid by one would not, alone, be sufficient to indemnify the plaintiff for the delay. It was in evidence that the expenses of the ship amounted to ten guineas a day, and

only three of the consignees had incurred demurrage upon [* 391] similar bills of lading, so that no very large profit * resulted

from the transaction; and since it was uncertain whether the plaintiff might obtain freight from more than one person, it was competent for him to form the like engagement with as many as offered. This is not a joint contract with the twenty consignors who may have goods on board this vessel, stipulating that they shall between them pay £4 per day demurrage, and if it were, how could the sum be apportioned, when each takes out his goods on a different day? In the case of *Randall v. Lynch*, 2 Camp. 352 (11 R. R. 727), it was held that the necessary delay, occasioned by the crowded state of the London docks, did not excuse the freighter from paying demurrage for the ship's detention.

Lens and Vaughan, Serjts., in the two first of these cases, and Cockell, Serjt., in the last, *contra*. The plaintiff first attempted to charge the defendant upon the ground of a supposed default in him, but that ground failing, he resorts to the ground of mere detention, to which the defendant is no wise instrumental. The

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counts which aver a contract to take out the goods in a reasonable time must be laid out of the question, since the evidence of the bill of lading specifies the time, 20 days. The importance of the subject to the commerce of this country is such, that the case of *Randall v. Lynch*, which was decided only at *nisi prius*, though it was the impression made on a very learned mind, deserves to be more fully considered. The words which are supposed to raise this obligation are the language of the plaintiff, by him inserted in a bill of lading, which he delivers to the shipper abroad, a person probably ignorant of the state of circumstances here; how it came to be so inserted does not appear: the bill of lading is not signed by the defendants, and it is as yet a new question, whether the acceptance of goods, accompanied with the delivery of a bill of lading, will amount to a contract; and if it does, * whether [* 392] it be the effect of such a contract to raise this claim.

The necessary inconvenience now incident to every ship which enters the port of London, is equally notorious to both parties, but this agreement does not refer to that inconvenience, nor affect to obviate it. That burden is therefore left, by this contract, where the law places it. It appears by the plaintiff's own instrument, that £4 *per diem* is a sufficient compensation for the detention of the vessel. If twenty persons, then, have accepted such bills, it must be a *nudum pactum* as to all except the first. It was in evidence, too, that no delay was occasioned by the defendants, but the delay arose from the 80 puncheons which lay above the defendants' goods; the latter could not have been gotten out, until the former were previously discharged, without extraordinary exertions, which exertions it belonged to the plaintiff to make: therefore, even if the law were as the plaintiff contends, the demurrage must be reduced from the 46 days, to the period which elapsed between the 1st of September, when the 80 superincumbent casks were removed, to the 7th, when the last of the defendants' goods were discharged: and as to the defendants, Yates and Gorst, it was not attempted to show on what day they could have been permitted by the officers of the dock to receive their goods, if they had been willing to pay duty for them instead of bonding them. It is urged that the defendants are liable for the whole delay, because they intended to bond the whole of their goods; but the plaintiff ought to have done that which he has not attempted, to have shown how soon the whole could have been

discharged if the defendants had been willing to pay duty for the whole; because from the expiration of that time only could the charge of laches rest with the defendants. But it is incumbent on the plaintiff to show that he had done everything which on his part was requisite towards the discharge of the ship, [* 393] before he can *urge any non-feasance of the defendants, as a ground for charging them with this sum, for it is at least a concurrent, if not a precedent condition, that the plaintiff should place the goods in a situation ready for delivery; but here, if either of the defendants had paid the whole duties, his goods were in such a situation that he would have been unable to obtain them. The count, too, is for detaining the whole of the ship, whereas the evidence proves but the detention of a small part.

Cur. adv. vult.

MANSFIELD, C. J., on this day delivered the opinion of the Court.

It is impossible to decide these three very singular cases without being struck with the enormous gain which the owner may get by this bill of lading; and which may possibly much exceed what in justice and conscience he ought to have. This is a general ship; thirty or forty persons may have goods on board, and for every one of them the owner may have his £4 per day. It was said, indeed, that, in fact, the £4 per day for these three persons would not much exceed the fair charge for the demurrage of the whole ship: but it might have happened that many more persons might have become liable, and a much larger profit might have accrued. I was struck very much with the argument, that it was not the fault of the defendant, but the fault of the plaintiff himself, that these goods could not be got out till the other goods which lay above them were delivered. But it is not, in truth, the fault either of the plaintiff or defendant, that the goods could not be taken out. There can be only so many goods at the top of the vessel as the proper stowage of the goods will allow, therefore all the others must be at the bottom: and as this is a general ship,

and the goods do not all belong to the same consignee, [* 394] the goods of some of the consignees * must be undermost.

If this argument would avail, therefore, that the captain is not entitled to demurrage for those goods which were not uppermost, it would restrain the contract for demurrage to the few per-

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sons whose goods were at the top, but that construction would be contrary to the positive contract; for it is impossible to get out of the words of this bill of lading, which, though it is a singular species of contract, to bind a consignee by an instrument signed not by himself, but by the captain, yet as the consignors delivered the goods on board under that bill, and the defendants accepted that bill of lading, it is binding upon them, and therefore this action may be sustained on the general count for demurrage, and consequently the

Rule must be discharged.

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1 Q. B. D. 244-250 (s. c. 45 L. J. Q. B. 511; 34 L. T. 526; 24 W. R. 611).

Charter-party. — Demurrage. — Delay caused by bad Weather.

By a charter-party for a voyage with a cargo of timber from Pensacola [244] to a safe port in the United Kingdom "sixteen working days [were] to be allowed the merchants for loading the ship at Pensacola, and to be discharged at such wharf or dock as the charterers may direct, always afloat, in fourteen like days, and ten days on demurrage over and above the said lying days at £10 per day."

The ship was ordered to M., and arrived at the usual place of discharge in the river and began unloading. It was the duty of the master to put the timber over the ship's side, and form it into rafts, and the charterer was to send tugs and take the rafts away. During the unloading bad weather came on, and, though the ship did not leave her anchorage, the rafts could not be formed, and the charterer therefore could not do his part in taking the timber away. The bad weather caused a delay of four days in discharging the ship. An action having been brought by the shipowner against the charterer for the four days' demurrage: —

Held, that, where a given number of days is allowed to the charterer for unloading, a contract is implied on his part that, from the time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitudes which may occur to prevent his releasing the ship at the expiration of the lay-days: and the defendant, therefore, was liable for the four days' demurrage.

First count, for not unloading and discharging the cargo of a ship of the plaintiffs within the fourteen lying days allowed by the plaintiffs to the defendant for so doing by agreement between them.

Second count, for demurrage.

Pleas, *inter alia*, to the first count: 1. That the defendant did not agree as alleged. 3. That the plaintiffs were not ready and

willing to permit the defendant to unload the ship. 4. That defendant was prevented from unloading solely by the acts and defaults of the plaintiffs and their servants. 5. To the rest of declaration never indebted.

Issue joined.

At the trial before GROVE, J., at the Michaelmas sittings in London, it appeared that the defendant chartered the plaintiff's vessel on the 31st of January, 1874, for a voyage from Pensacola to any safe port in the United Kingdom, as ordered, with a cargo of pitch pine timber.

[*245] * In the charter-party was the following clause: "Sixteen working days are to be allowed the said merchants (if the ship is not sooner dispatched) for loading the ship at Pensacola, and to be discharged at such wharf or dock as the charterers may direct, always afloat, in fourteen like days, and ten days on demurrage over and above the said lying days, at £10 per day."

The vessel was ordered to Middlesborough, and arrived at the usual place of discharge in the river Tees, and began discharging. It was the master's duty, by the practice of the port, to put the timber over the ship's side and form it into rafts, and the consignees then sent steam-tugs to carry it away. After the discharging had begun rough weather came on, during which the master, though ready, was unable to put the timber over the side and form it into rafts, and consequently it was not possible for the charterers to take any timber away, though the ship remained at her anchorage and the tugs could have towed the timber away if it could have been formed into rafts. The unloading was thus delayed, owing to the rough weather, four days.

On the other part of the case, on which no point of law arose, a verdict was found for the plaintiffs for £41 14s. 6d., and a verdict was taken for £81 14s. 6d., and judgment directed for that amount, with leave to defendant to move to reduce the amount by £40, being four days' demurrage at £10, if the Court should be of opinion that, on the true construction of the charter-party, the defendant was not responsible for the delay occasioned by the bad weather.

Notice of motion was given pursuant to the leave reserved, on the ground that the defendant was not responsible for the ship's detention during the days in which the ship was not ready to

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unload, raft, and deliver the cargo; and on the ground that those only of the lying days were to be reckoned as against the charterer during which the ship was so ready to unload, raft, and deliver cargo.

Feb. 16. C. Russell, Q. C. (with him Edward Pollock), in support of the motion. The defendant is not liable for the delay in unloading the ship where the unloading, as here, is the common employment of the ship and freighter. It was the duty of the *ship to discharge the timber over the side and form [*246] it into rafts, and then of the defendants, the charterers, to send tugs and take it away.

[BLACKBURN, J. Neither party was to blame for not working during the stormy weather.]

The default was in the ship; for if the rafts had been formed the tugs could have towed them away. The unloading being the common employment of both parties neither is liable for delay caused by *vis major*. *Ford v. Cotesworth*, L. R., 4 Q. B. 127, 38 L. J. Q. B. 52; L. R., 5 Q. B. 544, 39 L. J. Q. B. 188.

[BLACKBURN, J. There were no lay-days for unloading stipulated for there. The days are named on purpose to prevent these kinds of disputes.

LUSH, J. When a certain number of days for unloading are allowed, does not that mean that the charterer undertakes to unload in that time or pay demurrage?]

No doubt that was what was held in *Randall v. Lynch*, 2 Camp. 352, 356 (11 R. R. 727), and *Leer v. Yates* (p. 219, *ante*), 3 Taunt. 387 (12 R. R. 671). In the first case, Lord ELLENBOROUGH ruled that the freighter was liable for demurrage when the unloading was delayed by the crowded state of the dock. And, in the other, the Court of Common Pleas went so far as to hold that the freighter was liable where the delay in getting the defendant's goods out was caused by the goods of other consignees being above them. But in *Abbott on Shipping*, 11th ed. p. 275, it is said that the decisions in those cases, and the cases which followed upon them, have been much doubted; and the cases of *Rogers v. Hunter*, Mood. & M. 63, 65, and *Dobson v. Droop*, Mood. & M. 441, 443, 4 C. & P. 112, are cited, in which Lord TENTERDEN expressly dissented from the doctrine that there was an absolute contract by the freighter to unload within the stipulated time where the unloading was prevented by the goods of other consignees.

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Herschell, Q. C., and Sutton, showed cause. When a certain number of days are given for unloading, the lay-days begin from the time the ship is ready to discharge, and the charterer is responsible if he detain the vessel beyond the given number of days, however the delay may be occasioned, unless by the act of the shipowner.

[*247] * [BLACKBURN, J. By the mode of discharge at the port of Middlesborough it was the shipowner's duty to deliver the timber over the side and make it into rafts.]

No doubt; but it was not the master's fault that he could not deliver; it was owing to the tempestuous weather, in other words, neither party was in fault, and the consequences of the delay must fall on the charterer. In *Brown v. Johnson* (p. 201, *ante*), 10 M. & W. 331, 11 L. J. Ex. 373, delay was occasioned, after the ship was placed in dock, by reason of her being unable to get to a berth from the crowded state of the dock; and it was held that the lay-days ran from the entry into dock. There, just as here, neither party was in fault, but the loss was held to fall on the charterer. The principle of that case was expressly adopted in *Tapscott v. Balfour*, L. R., 8 C. P. 46, 42 L. J. C. P. 16, and *Ashcroft v. Crow Orchard Colliery Co.*, L. R., 9 Q. B. 540, 43 L. J. Q. B. 194. "Weather permitting" might have been added as an exception; but the charterer is bound to load and unload in the given days or pay demurrage, unless prevented by anything coming expressly within the exception. In *Fenwick v. Schmalz*, L. R., 3 C. P. 313, 37 L. J. C. P. 78, "riots, strikes, or any other accidents beyond the charterer's control," were excepted, and a snow-storm was held not to come within the exception; and that case is therefore an authority that the charterer is answerable for delay in unloading owing to bad weather. This was, in fact, taken as clear law as long ago as *Randall v. Lygch*, 2 Camp. at pp. 355, 356 (11 R. R. 729, 730). Lord ELLENBOROUGH there said, "The question is, whether the detention of the ship, arising from the inability of the London Dock Company to discharge her, is, in point of law, imputable to the freighter; and I am of opinion that the person who hires a vessel detains her, if at the end of the stipulated time he does not restore her to the owner. He is responsible for all the various vicissitudes which may prevent him from doing so. While the goods remained on board the vessel in the London Docks it was impossible for the plaintiff (the owner) to make use

of her, and to all intents and purposes she was there detained by the defendant. When she was brought into the docks, all had been done which depended upon the plaintiff, and the dock company were the defendant's agents for her delivery. The * defendant is as much responsible for a delay arising from [* 248] the want of a berth, as if it had arisen from tempestuous weather or any other cause." It is a fallacy to say that because it is the duty of the shipowner in this particular case to assist in the delivery, that therefore the charterer is not responsible if delay occurs owing to no default of the shipowner; although it was the duty of the master and crew to deliver the timber and form it into rafts, yet, as they were ready and waiting, the delay was not theirs. Suppose the cargo had been a perishable cargo, which was to be delivered over the ship's side into lighters, if wet weather prevented this being done the consequences of the delay must fall on the charterers. *Barker v. Hodgson*, 3 M. & S. 267 (15 R. R. 485), and *Barret v. Dutton*, 4 Camp. 333 (16 R. R. 798), were decided on the same principle as *Randall v. Lynch*. In *Barret v. Dutton*, GIBBS, C. J., held that where a certain number of running days were allowed for loading, the freighter is liable for delay caused by the impossibility of loading owing to ice in the river. The present case is not distinguishable in principle by the same simple fact that it is the acts of the master and crew in making the delivery that are directly prevented, and not the acts of the defendant in accepting it.

C. RUSSELL, Q. C., in reply.

Cur. adv. vult.

March 6. The judgment of the Court (BLACKBURN and LUSH, J.J.) was delivered by

LUSH, J.¹ This is an action for demurrage. The verdict was entered for the plaintiff for £81 14s. 6d., leave being reserved to the defendant to reduce the amount by £40, being for four days detention, at the stipulated rate of £10 per day; and the question is, whether, when a charter-party allows a given number of days for discharging the cargo, the charterer or the shipowner takes the risks of casualties in the weather which interrupt the process of unloading.

The charter-party was for a voyage from Pensacola to a safe

¹ The judgment was read by ARCHIBALD, J.

port in the United Kingdom, as ordered, with a cargo of timber.

[* 249] * The clause upon which the question turns is in these words: "Sixteen working days to be allowed the said merchants (if the ship is not sooner dispatched) for loading the ship at Pensacola, and to be discharged at such wharf or dock as the charterers may direct, always afloat, in fourteen like days, and ten days on demurrage over and above the said lying days, at £10 per day."

The ship, having been ordered to Middlesborough, arrived at the usual place of discharge in the river, and commenced the unloading. It was the duty of the master to put the timber over the ship, and form it into rafts, and the charterer was to take the rafts away.

In the course of the unloading, bad weather came on, and, though the ship did not leave her anchorage, the rafts could not be formed, and the charterer consequently could not do his part in taking the timber away. The bad weather caused a delay of four days in discharging the ship: and the contention of the defendant was, that, as he was not in default, but was ready to receive the timber, but the master was not ready to deliver it, the time lost in consequence of the bad weather ought not to be reckoned as part of the fourteen days.

We took time to look into the authorities, and are of opinion that, where a given number of days is allowed to the charterer for unloading, a contract is implied on his part, that, from the time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitudes which may occur to prevent him releasing the ship at the expiration of the lay-days. This is the doctrine laid down by Lord ELLENBOROUGH in *Randall v. Lynech*, which was upheld by this Court; and it has been accepted as the guiding principle ever since: see *Leck v. Yates* (p. 219, *ante*), 3 Taunt. 387 (12 R. R. 671), *Harper v. M'Carthy*, 2 Bos. & P. (N. R.) 258, 267, *Brown v. Johnson* (p. 201, *ante*), 10 M. & W. 331, and the other cases cited in the argument.

The obvious convenience of such a rule, in preventing disputes about the state of the weather on particular days, or particular fractions of days, and the time thereby lost to the charterer in the course of the discharge, makes it highly expedient that

[* 250] this *construction should be adhered to, whatever may be the form of words used in the particular charter-party.

The judgment of the Court will, therefore, be for the plaintiffs for the full amount.

Judgment for the plaintiffs.

ENGLISH NOTES.

The implied liability of the merchant under such a contract of afreightment as that described in the rule has been held to extend to delay occasioned by the crowded state of the docks at the port of discharge, *Randall v. Lynch* (1809), 2 Camp. 352, 11 R. R. 727; or by a strike of workmen at the port of discharge, even where by the custom of that port the cargo is discharged by the joint act of the shipowner and the consignee, and the dispute affects the labourers employed by both, *Budgett & Co. v. Binnington* (C. A. 1890), 1891, 1 Q. B. 35, 60 L. J. Q. B. 1, 63 L. T. 742, 39 W. R. 131; or by an infectious disease at the port of loading preventing intercourse with the shore, *Barker v. Hodgson* (1815), 3 M. & S. 267, 15 R. R. 485.

The merchant has also been held liable for delay occasioned by the refusal of custom house officers to allow part of the cargo to be taken out of the ship, *Bessey v. Evans* (1815), 4 Camp. 131; and in another case by the necessity of obtaining a special order from government for the landing of the goods, *Hill v. Idle* (1816), 4 Camp. 327, 1 Starkie N. P. 111, 16 R. R. 797; but not by a hostile occupation of the destined port, though it may lead to the entire abandonment of the voyage, and so render the employment of the ship unprofitable, *Liddard v. Lopes* (1809), 10 East, 526, 10 R. R. 368.

The merchant is answerable for delay, though he may have received no notice of the ship's arrival; for it is his duty to watch her arrival. *Harman v. Clarke* (1815), 4 Camp. 159, 16 R. R. 768; *Harman v. Munt* (1815), 4 Camp. 161, 16 R. R. 770; and though he has been prevented from taking delivery owing to the non-arrival of the bill of lading, the master being entitled to insist upon the production of that document before parting with the goods, *Jesson v. Solby* (1811), 4 Taunt. 52, 13 R. R. 557.

The last clause of the rule as to the merchants' liability for the conduct of the owners of other goods, is borne out by the ruling case (No. 1) *Leer v. Yates*, p. 219, *ante*. The soundness of that case was questioned by Lord TEXTERDEN, who expressed an opinion that a consignee who had no opportunity of taking his goods within the time stipulated could not be said to detain the vessel if he removed them within a reasonable time after he was able to get at them. Any doubt as to its validity as an English authority has, however, since been dispelled, the case having been expressly approved in *Straker v. Kidd* (1878), 3 Q. B. D. 223, 47 L. J. Q. B. 365, 26 W. R. 511, and by the Court of

Appeal in *Porteus v. Watney* (1878), No. 10, p. 269, *post*, 3 Q. B. D. 534, 47 L. J. Q. B. 643, 39 L. T. 195, 27 W. R. 30.

In the former of these cases the cargo was shipped under several bills of lading, each of which stipulated for "three working days to discharge the whole cargo, or £30 sterling per day demurrage." The defendants, the indorsees of one of the bills of lading, were prevented from clearing the ship, within the agreed time, of their portion of the cargo which lay at the bottom of the hold, by reason of the delay of the consignees of the upper portions; yet it was held, that they were liable for demurrage. In *Porteus v. Watney, supra*, the stipulation as to lay-days and demurrage was contained in the charter-party; and the bills of lading, one of which had been indorsed to the defendants, contained the words "paying freight for the same goods and all other conditions as per charter-party." The facts were in other respects similar to those in *Straker v. Kidd*, as also was the judgment of the Court. It is to be observed however that THESIGER, L. J., though he refrains from expressing a positive opinion on the point, says: "I do not think it altogether clear that when a bill of lading stipulates that a consignee under it is to have his goods on payment of freight and on the performance of all other conditions of the charter-party, and in point of fact all demurrage due under the charter-party has been paid to the shipowner by some other consignee under a similar bill of lading, so that the condition in the charter-party as to demurrage has been performed, although not by the particular consignee; that fact would not constitute in equity, if not at law a defence, to an action for demurrage brought against the first consignee."

In *Postlethwaite v. Freeland* (1880), 5 App. Cas. 599, 49 L. J. Ex. 630, 42 L. T. 845, 28 W. R. 833, the rule at present under consideration is thus concisely stated by Lord SELBORNE in the House of Lords: — "If by the terms of the charter-party, he (the charterer) has agreed to discharge it (the cargo) within a fixed period of time, that is an absolute and unconditional engagement for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to be detained in his service beyond the time stipulated."

The merchant, however, will be excused if the delay is occasioned by the fault of the shipowner. *Hansen v. Donaldson* (1874), Court of Session, Scotland, 4th Series, Vol. 1, 1066; *Benson v. Blunt*, (1841), 1 Q. B. 870, 1 Gale & Dav. 449; *Bradley v. Goddard* (1863), 3 F. & F. 638; *Harris v. Best-Ryley* (1893), 68 L. T. 76. But where the shipowner, in complying with a request of the charterer that he would not show himself lest if he did so the price of the goods carried should

Nos. 5, 6. — *Leer v. Yates*; *Thiis v. Byers*. — Notes.

fall in the market, failed to procure at the custom house the papers necessary for clearing the ship, the charterer was held liable for demurrage. *Furnell v. Thomas* (1828), 5 Bing. 188. And where the defendant chartered the plaintiff's ship to bring a cargo of hay from France to London — the cargo to be brought and taken from the ship alongside — and, the landing of such a cargo being forbidden by an Order in Council of which both parties were ignorant, the cargo was after some delay taken from alongside the ship and exported; it was held, that the defendant was liable for the delay, the contract having been carried out without any violation of the law. *Waugh v. Morris* (1873), L. R., 8 Q. B. 202, 42 L. J. Q. B. 57, 28 L. T. 265, 21 W. R. 438.

On the other hand where the contract provides that the merchant is to have the usual and customary time to unload the vessel at her port of discharge, he may, without being responsible for the delay, have her unloaded in her turn into a bonded warehouse where that is the usual practice of the port in the case of similar cargoes. *Rodgers v. Forresters* (1810), 2 Camp. 483, 11 R. R. 773. The same law was laid down with respect to a consignee of goods sent in a general ship without any stipulation in the bill of lading as to the time of unloading. *Burmester v. Hodgson*, (1810), 2 Camp. 488, 11 R. R. 776.

AMERICAN NOTES.

Leer v. Yates is largely cited in 1 Parsons on Shipping, p. 314, where it is said: "A delay by capture, or embargo, or by any compulsion, gives no ground for a claim for demurrage, according to some authorities, because for this there must be a voluntary delay; such at least appears to have been once regarded as the general principle. *Douglas v. Moody*, 9 Massachusetts, 548, 555. But the decisions on this question cannot be reconciled. On the whole, we prefer those which hold that the consignees shall, generally at least, pay demurrage, although no blame be imputable to them, provided the owner be not in fault."

In *Duff v. Lawrence*, 3 Johnson's Cases (New York), 162, it was held that a delay for quarantine does not found a claim for demurrage, but where the prohibition of entry was permanent, the charterer should pay for the delay, especially as by the charter-party he might have gone to another port although on payment of a higher freight.

Leer v. Yates and *Barker v. Hodgson*, 3 M. & S. 267, are cited in *Benson v. Atwood*, 13 Maryland, 20; 71 Am. Dec. 611, where demurrage was allowed because no one was present at the port of destination from whom the captain could take orders, and he was ordered away by the government and sailed for another port.

In *Wordin v. Bemis*, 32 Connecticut, 268, a claim of demurrage was disallowed where the delay was caused by an extraordinary and unforeseen acci-

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mulation of vessels at the dock, provision having been made for seven, which was sufficient for ordinary demands.

In *Brooks v. Minturn*, 1 California, 481, a vessel being seized by revenue officers, it was held that no demurrage was recoverable if the seizure was illegal, or if legal but occasioned by fault of the ship-owner or his agent, but it was not determined what would be the law if the seizure was by fault of the consignee.

A master of a vessel prevented by revolution from landing safely at the port of destination is guilty of want of good faith in selling the property at a foreign port at a time after he could have returned to the home port with the cargo, and conferred with the owners and shippers; but he should either dispose of the goods in good faith and to the best advantage in the nearest port he is able to reach, or return the goods to the shippers, with reasons for non-delivery. *The Joseph Oteri, Jr.* (U. S. Circ. Ct. App. 5th C.) 66 Fed. Rep. 581.

No. 7. — DAHL v. NELSON (APPEAL FROM NELSON v. DAHL).

(H. L. 1880.)

RULE.

A CHARTER-PARTY to certain “docks” is not satisfied by the ship arriving at the gate of the docks without entering in.

But where the charter-party was to “London Surrey Commercial Docks, or as near thereto as she may safely get and always lie afloat,” and — the harbour-master having refused to permit entrance to the dock on account of there being no early prospect of giving her a discharging berth — the vessel was moored at a buoy, being the nearest place where she could lie in safety afloat, and there discharged the cargo by lighters: — *Held*, that the shipowner, on so mooring his ship and being ready there to discharge, fulfilled his part of the contract; and that the responsibility for any subsequent delay in discharging lay on the charterer.

Dahl v. Nelson.

6 App. Cas. 38-63 (s. c. 50 L. J. Ch. 411; 44 L. T. 381; 29 W. R. 543.)

Demurrage. — Charter-party. — Discharging Cargo. — Docks.

A charter-party for a ship to sail to "London Surrey Commercial [38] Docks" is not satisfied by the ship arriving at the gate of the docks but not entering into the docks.

There is no established custom in the port of London by which the charterer of a timber-loaded ship is bound to secure for the vessel, on its arrival in the river, and in close contiguity to the docks named, the authority to enter into the docks.

The charter-party was to "London Surrey Commercial Docks, or as near thereto as she may safely get, and lie always afloat." As the docks were full the ship could not be given a discharging berth, and the dock manager therefore refused it entrance into the docks. Both parties having named these docks in the charter-party, this refusal of the dock authorities was held not to be the fault of either party. The cause of the delay as to being admitted into the docks was immaterial; the length of the delay was material.

The charterer would not name any other docks to which the ship might be taken. The ship's master therefore took it to the Deptford Buoys (the nearest place to the Surrey Commercial Docks where it could lie in safety afloat) and there discharged the cargo by lighters, carrying the timber into the Surrey Commercial Docks, where it was afterwards sorted and put in order on the wharf: —

Held, that under the circumstances existing in this case, the delay in discharging the cargo was to be attributed to the charterer, who therefore became liable to demurrage, and to the charges for unloading.

The contract in the charter-party as to demurrage was this: The cargo was to be supplied as fast as it could be taken on board, "and to be received at port of discharge as fast as steamer can deliver as above, . . . and ten days demurrage over and above the said laying days" [there were no laying days mentioned in the charter-party] "at £30 per day payable day by day, it being agreed that for the payment of all freight, dead freight, and demurrage, the owner shall have absolute charge and lien on the said cargo, . . ." "The cargo to be brought to and taken from alongside the ship at merchants' risk and expense."

The ship did not fulfil the engagement in the charter-party to proceed to the Surrey Commercial Docks by merely going to the gates of the docks, but when it had fulfilled the alternative to go as near thereto as it could safely get, the charterer was bound to take the cargo from alongside at his risk and expense. The shipowner was not bound to wait for an * unreasonable period, [* 39] until the dock authorities should be able to assign the ship a discharging berth in the docks.

When that difficulty arose about the ship being admitted into the Surrey Commercial Docks, and the charterer would not name any other docks or place

where the vessel might be unloaded, the shipowner gave notice to the charterer of the discharge of the cargo by lighters, and, on taking the timber into the docks, gave notice to the dock authorities that it was delivered there subject to the claim for freight, demurrage, and delivery charges: —

Held, that he was warranted in so doing.

Appeal against a decision of the Court of Appeal, in an action for demurrage and landing charges, in respect of the ship *Euvine*.

The appellant was a timber merchant in London. The respondents were shipowners at Newcastle. The appellant had on the 21st of June, 1877, entered into a charter-party with the respondents in respect of their steamship *Euvine*, which was to proceed to Soderhamn, and there load a cargo of deal timber. The charter-party stipulated that the *Euvine* "being so loaded shall therewith proceed to London Surrey Commercial Docks, or so near thereunto as she may safely get, and lie always afloat, and deliver the same on being paid freight." The charter-party contained the following stipulations: "The freight to be paid on unloading and right delivery of the cargo. . . ." "The cargo to be supplied to the steamer at port of loading as fast as she can take the same on board, Sundays and legal holidays excepted, and to be received at port of discharge as fast as steamer can deliver as above. . . . And ten days on demurrage over and above the said laying days" [there was no statement as to the number of laying days], "at £30 per day, payable day by day, it being agreed upon that for the payment of all freight, dead freight, and demurrage the owner shall have absolute charge and lien on the said cargo. The cargo to be brought to, and taken from, alongside the ship at merchants' risk and expense. . . . If ordered to London the steamer to discharge in one of the docks in the river Thames, the freighter to pay two-thirds of the dues."

The cargo was received on board at Soderhamn between the 21st and 28th of July, 1877, and the *Euvine* reached the port of London on the 4th of August, 1877, and on the same day proceeded to the Surrey Commercial Docks. It did not obtain entrance there,

the docks being at that time quite full. The appellant [40] *had on the 16th of July, 1877, obtained, signed, and sent

into the dock authorities the usual form of order required by them to authorize the ship to enter the docks, but the dock manager declined to receive the order on the ground that the docks were not only then completely full, but that for some time to

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come they would be so, and no berth could be assigned to the *Euxine*. The appellant made another attempt, but in vain, to obtain the entry of the ship under the order. It was well known that, from the superior skill possessed by the persons employed at the Surrey Commercial Docks in unloading and classifying timber, a cargo of timber there discharged acquired a higher value in the market. On the 4th of August the *Euxine* arrived at the entrance of the docks; it was refused admission. The respondents then required the appellant to name another dock for the discharge of the cargo, but he declined to do so. The master then took the *Euxine* to the Deptford Buoys, the nearest place to the docks where the vessel could lie in safety afloat, and thence, by lighters, he effected the discharge of the cargo. The lighters carried the timber into the Surrey Commercial Docks, the last lighter going in on the 31st of August, 1877, but the whole of the timber was not landed on the wharf till the 28th of October, 1877. The respondents served notices under the Merchant Shipping Act, 1862, on the appellant that the timber was there deposited, and also on the dock authorities that it was so deposited, subject to lien for freight, charges, and demurrage. The appellant deposited £2000 with the dock company to meet these claims, and then received the timber.

An action was brought by the respondents on these claims for demurrage and charges, upon the ground that the appellant, as charterer of the vessel, was bound to provide for the entry of the vessel into the docks, and was therefore liable for the delay which had occurred. The appellant denied his liability, and made a counter-claim for damages on account of the stop put on the delivery of the cargo, by the service on the dock company of the claim for lien for freight, charges, and demurrage; and also for alleged injury to the timber by reason of the unfitness of the lighters employed. The MASTER OF THE ROLLS (before whom the case was tried, without a jury) decided that the alleged custom which bound the charterer to secure the admission of the vessel * into the docks was not proved, and that the obliga- [* 41] tion to provide a berth lay equally on both parties, that as the ship had "not gone inside the dock gates," the voyage had not been completed within the terms of the charter-party. His Lordship therefore ordered the action to be dismissed. On appeal this decision was reversed (12 Ch. D. 568).

Mr. C. Russell, Q. C., and Mr. A. L. Smith (Mr. R. T. Reid was with them), for the appellant, contended that the voyage had not been completed, and that the ship was not to be treated as an arrived ship, as it had never entered the docks named in the charter-party as the place of destination. The liability of the charterer for delay in unloading had therefore never arisen, and consequently the charge for demurrage could not be sustained.

Mr. Benjamin, Q. C., and M. Cohen, Q. C. (Mr. Rigby was with them), for the respondents, contended that the default in not entering the docks was attributable to the appellant, who was bound by the general law, as the charterer, and by the custom of the timber trade in the port of London, to secure the admission of the vessel into the docks named, and if he could not obtain such admission there, he was bound to name some other docks where the vessel could be discharged, for that the shipowner was not bound to wait for an indefinite time in anticipation of the possibility of a berth in the Surrey Commercial Docks being procured for the discharge of the vessel. Here, too, the appellant had, in fact, hindered the steamer from being admitted into the docks.

The cases cited and the arguments in detail are so fully discussed in the judgments of the noble and learned Lords as to render a more extended report of them unnecessary.

LORD BLACKBURN : —

My Lords, the question in this case is whether the defendants have broken the contract into which they have entered with the plaintiffs; and the first matter to be considered is, what was that contract?

It is contained in a charter-party, dated on the 21st of June, 1877, in a printed form filled up in writing, made between [*42] the * plaintiffs, owners of the *Eurine* steamship, and the defendants, by which it is agreed that the *Eurine* should proceed to a port named, and there load from the defendants a full cargo of deals. This was done, and there is no dispute about that part of the contract. The charter-party then proceeds, — that the *Eurine* “being so loaded shall therewith proceed to London Surrey Commercial Docks, or so near thereto as she may safely get, and lie always afloat, and deliver the same on being paid freight” at a specified rate, certain perils mentioned always excepted. The other provisions which are material are as follows: “The cargo to be supplied to the steamer at port of loading as fast as she can take

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the same on board, Sundays and legal holidays excepted, and to be received at port of discharge as fast as steamer can deliver as above. And ten days on demurrage, over and above the said laying days, at thirty pounds per day, payable day by day, it being agreed upon, that for the payment of all freight, dead freight, and demurrage, the owner shall have absolute charge in lien on said cargo. The cargo to be brought to and taken from alongside the ship at merchants' risk and expense."

The *Eucine* was not delayed or hindered by any of the excepted perils, and arrived at the entrance of the Surrey Commercial Docks. It was refused admittance to the docks under circumstances which I shall state more fully afterwards.

The plaintiffs tried to prove that there was a custom in London as regards this trade, such as to be tacitly incorporated in the written contract. In this they failed, and consequently the liabilities which the parties have by the contract taken upon themselves must depend on what is the true construction of the charter-party.

The plaintiffs contended in the Court below that by such a charter-party as this the merchant undertakes to procure the ship admission into the docks. Neither the MASTER OF THE ROLLS nor the Judges in the Court of Appeal took this view of the charter-party, and it was not much urged at your Lordships' Bar. I think it is clear that it is untenable. The legal effect of the contract, in my opinion, as far as regards the shipowner, is, that he binds himself that his ship shall (unless prevented by some of the excepted perils) proceed to the discharging place agreed on in the * charter-party. That is, in this case, the Surrey [*43] Commercial Docks (which must, I think, mean inside the docks), with an alternative, "or so near thereto as she may safely get and lie always afloat."

The legal effect, as regards the obligation on the merchant, is, I think, that he binds himself, on the ship arriving at the place where it is to deliver, to take the cargo from alongside, and for that purpose to provide the proper appliances for taking delivery there. If, as both parties wished and expected, it got to a discharging berth within the dock, the merchant was, by himself, or the dock company as his agents, to provide proper means for landing the cargo on the quay. If the ship may not get safely farther than the entrance of the docks, and is entitled to require the

merchant to take delivery in the river (which is what it is said by the plaintiffs has happened in this case), the merchant must provide lighters or other craft to take the cargo from alongside, unless it is arranged by the parties that, instead, it should go into some other dock.

If the ship had been permitted to get into the docks and lie there, but had been unable to get to a discharging berth, the merchant might have brought lighters to it and taken delivery in the middle of the docks, whether he was bound to do so or not; I do not say, for it is not necessary to decide, what would have been the rights and liabilities of the parties if the ship had been admitted inside the dock gate, as this did not, in fact, happen. I will only observe that, though in the printed form it is said "and ten days on demurrage over and above the said laying days," there are no laying days provided in this charter-party in the sense in which I understand these words, and the ten days on demurrage can only begin after the ship has been at the place where the merchant ought to have taken delivery, long enough for the merchant to be in default for not having completed the discharge. There is no period specified in this charter-party within which the merchant has engaged that the ship shall at all events be discharged, which is what I understand by laying days. I think, therefore, that the cases (such as *Brown v. Johnson*, 10 M. & W. 331, 11 L. J. Ex. 373, p. 201, *ante*), deciding when lay-days commence, have no direct bearing on such a charter-party as [* 44] this. Both parties agreed in naming the Surrey *Commercial Docks in the charter-party as the docks to which the steamer was to go. I can see nothing amounting to a contract either on the one side or the other to procure the ship admittance, nor has any authority been cited to the effect that such a contract is implied. If the charter-party had left it free to the merchant to select a dock, it may be well that he was bound to select one into which admittance could be procured. *Ogden v. Graham*, 1 B. & S. 773, 31 L. J. Q. B. 26, is an authority in favour of that position. And in *Samuel v. The Royal Exchange Assurance Company*, 8 B. & C. 119, where the merchant directed the shipowner to proceed to the King's Dock at Deptford, and the ship arrived near the dock gates whilst there was much ice, but the merchant was not able to procure an order to admit it for some days, Lord TENTERDEN ruled that if the ship remained there waiting for an

order to admit, it was an unreasonable delay, which would discharge the underwriters, but otherwise if the delay was on account of the ice. That authority seems to point the same way. I do not, however, pronounce any decision on this, as it is not the case now before the House. I only mention it to prevent it being said that what I now say would be applicable to such a case.

But where, as in this case, the dock is named from the beginning by both parties, I think the refusal of the dock authorities to let the ship inside the dock gates is the fault of neither party. They ought to have foreseen that it might happen that the dock company would, owing to the exigencies of their traffic, refuse to admit a steamer for some time; in fact, it appears, from the evidence, that before the charter-party was made both parties knew that the number of timber-laden steamers was so unusually great at this time that it was very likely to happen that they would refuse for a long time. They might have made any new provision on which they could agree. If they had in terms said that, in the event of something for which neither party was responsible rendering it impossible to get into the dock at all, or without a delay so great as to render it unreasonable to wait, the shipowner would, unless excused by some of the excepted perils, bring his ship to a discharging place in London, as near as might be to the dock, and deliver there, and that the merchant should take the *cargo there and pay the freight, I think they would [*45] have come to as prudent an arrangement as could well be devised. They preferred to keep unaltered the old form, "or so near thereto as she may safely get," and be bound by whatever the legal effect of that might be. Before proceeding farther I think it convenient to see what, on the evidence, were the facts on this part of the case.

The practice of the Surrey Commercial Docks was to give orders for the admission of steamers to their docks to discharge there, which were, in practice generally, on the application of the charterer or his representative, made either before or after the arrival of the steamer. By giving such an order the dock company agreed to admit the steamer, and on the production of the order, after the arrival of the steamer, it was, as soon as practicable, admitted into the docks. The company, in practice, limited the number of the orders to so many steamers as they at the time thought they could accommodate with discharging berths.

On the 16th of July, Messrs. Dahl, having probably heard by telegraph that the *Euxine* was about to start, applied for an order for the admission of the *Euxine*. The superintendent of the docks, Mr. Ross (who died before the trial), wrote the two following letters: "19th July, 1877. Gentlemen, Referring to the inclosed orders for the steamships *Euxine* and *Chatsworth*, I beg to inform you that, on looking over the list of Gravesend orders I have accepted, I fear I have rather exceeded the number of steamers for which I can safely provide accommodation during the months of July and August. Under these circumstances you may, perhaps, think it advisable in your interest to arrange for the vessels to be discharged elsewhere." "25th July, 1877. Gentlemen, I much regret to be again compelled to return the indorsed order for the '*Euxine*' (S.) from Soderhamn, but on going round the docks to-day I find my position is even worse than I anticipated. The quays are so loaded with goods that it will be impossible for me to afford the vessel anything like the usual steamboat despatch."

On the arrival of the *Euxine* the ship's agents applied to the dock company to take the vessel, but were refused. It appears, on the evidence, that there was plenty of room inside the [*46] dock * for the *Euxine* to lie afloat, but that the company would not admit any steamer until there was a prospect of being able, within a reasonable time, to give it a discharging berth. The legal advisers of the defendant thought (whether correctly or not it is not necessary to decide) that if once admitted within the dock gate the merchants would be answerable for all subsequent delay, and the defendant pressed Mr. Griffin, the secretary of the dock company, not to let the *Euxine* enter the docks until they could give her a discharging berth. The secretary, to relieve his mind, on the 7th of August sent a telegram to the superintendent in these terms: "Can you give *Euxine* immediate discharging berth? If not, on no account admit steamer into dock."

This was relied on by the plaintiffs as proving that the defendant hindered the steamer from entering the dock. But it is clear, from the evidence of Mr. Griffin (the dock secretary), that the dock authorities, in their discretion, refused to admit any steamers other than those they had already engaged for (though there was plenty of room for them to lie without discharging), until there was a prospect of giving it a discharging berth, and that he refused

to admit the *Euxine*, on the 7th of August, because he could not then give the steamer a discharge berth, and not on account of the defendant's request, and, on being asked the question expressly, he says that he had no prospect of being able to give a berth after a short delay, or within any reasonable time. The dock authorities, it seems to me, acted very properly and prudently in what they did, but even if they were wrong, the defendant was not responsible for this.

Though the secretary must, at the time he gave his evidence, have known when, as it really turned out, a steamer arriving on the 7th of August could have had a discharging berth, neither side asked that question. He does say that, if it had been admitted into the dock to lie afloat, it would in the then state of the traffic, have been five weeks before the ship could have been discharged into lighters there, from which it would seem that it would have been longer before it could have got a discharging berth, and, as demurrage was at £30 a day, it is obvious that the consequences of the delay would have been serious. I may observe that the anxious desire of the defendant that the steamer *should [* 47] not be admitted within the dock gate, when he believed (whether rightly or wrongly) that the doing so would fix him with the cost of the delay, is evidence that he believed the delay would be important.

The plaintiff's legal advisers wrote to the defendant the following letter, and received the following answer: "7th August, 1877. We are instructed to inform you that the ship, *Euxine*, chartered by you, is in this port ready to discharge. The Surrey Commercial Docks Company have declined to allow the vessel to enter their dock, as they, we learn, intimated to you several days ago. The ship's lay-days begin to-morrow. Should she not be discharged by you with the usual despatch, you will be held answerable for demurrage. Your lighters should be alongside, as you have been already informed, by the first thing to-morrow morning. The cargo would be discharged in two or three days. This notice is given you that you may take such steps as you think right to expedite the unloading of the ship." "Re *Euxine*, 8th August, 1877. Our legal advisers tell us to say, in reply to your favour of yesterday, that: The ship is chartered for the Surrey Commercial Docks, and that when the vessel is there we will be prepared to fulfil your client's contract with us, and take

delivery of the cargo. The notice given by you is one which you have no power to give, and which we are not called upon to obey. If the captain enters into a contract to go to a particular dock, he must go there, and it is no business of the receivers that the dock at the time of his arrival is full and cannot take him in. He must wait till there is room." Some attempts were made to come to an amicable settlement, which unfortunately failed, and both parties stand on their legal rights. It is perfectly plain to my mind that the ship did not fulfil the primary engagement in the charter-party to proceed to the Surrey Commercial Docks by merely proceeding to the gate of that dock, but if, under the circumstances, the ship had, on the 7th of August, fulfilled the alternative of proceeding "as near thereto as she may safely get," the merchant was, by his agreement, to take the cargo from alongside at his risk and expense, and there is no reason why he should not

have to bear all the damage occasioned by his refusal to [*48] comply with the request contained in the letter of the * 7th of August to send lighters alongside, which, on the assumption that she had got as near thereto as she could safely get, was what he had undertaken to do.

Two questions arose on these points: 1. Whether the *Eusine* could have got into the dock without such a delay as would have been unreasonable, taking into account the nature of the transaction and the interests of both parties. That was one of fact, to be determined on the evidence. 2. Whether, supposing that fact to be found in favour of the plaintiffs, the *Eusine* had got as near thereto as she might safely get, within the meaning of the contract. That was a question of law, depending on the construction of the written contract.

As far as regards the question of law, it is not material when or by whom the question was first raised; your Lordships having to decide it according to law. But as regards the question of fact depending on the evidence, it might be material when it was raised, for if the point had not been raised at all by the plaintiffs it would have been possible enough that the defendants refrained from calling farther evidence, which would have altered the case.

But in fact, it appears by the shorthand-writer's note that Mr. Chitty in his opening distinctly stated this as part of the plaintiff's case; and it was brought to the mind of the MASTER OF THE ROLLS, for he afterwards asks Mr. Russell what he said was the

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meaning of the words "as near thereto as she may safely get." A considerable argument ensued, Mr. Russell contending then, as he did afterwards, that the prevention must be physical, from something endangering the safety of the ship, and that it must be permanent: and when pressed he said that though the cause of obstruction was a physical one, and one which would last a year, the steamer must wait a year. The MASTER OF THE ROLLS said, as I think he well might, "To suppose that two commercial men should enter into a contract to charter a steamer to go to a dock, or as near thereto as she may safely get, that that means that she is to wait outside for a year because the dock is out of repair, is to my mind absurd. (Mr. Russell): If the proposition looks nonsensical, if your Lordship pleases, instead of being a year, suppose it is a month — (The MASTER OF THE ROLLS): I do not know that it is — *(Mr. Russell): Or a fortnight." So [*49] that there was ample time to call on the defendant to produce whatever evidence he could to show that the delay in the present case would not have been unreasonable.

* The expressions of the MASTER OF THE ROLLS seem to indicate that at that moment he was not inclined to look with favour on this contention of the defendant. If such was his then opinion, he changed it, for in delivering judgment a few days afterwards he says (12 Ch. D. at p. 573): "I do not see any answer to the suggestion that the contract was to take the cargo there, and that the shipowner must wait until he could get into the dock. It makes no difference whether the cause of prevention was the dock being full of vessels, or some other accident. It might have been stress of weather, or that the vessel drew more water than there was over the silt of the dock at one time, assuming the water to flow in more at one period than at another, or it might have been an accident to the dock gates which prevented the vessel going in for a period of time longer or shorter, as the case might be. The shipowner takes the risk of accident; so does the charterer, because in this case the charterer has to wait for his cargo. There is a risk on both sides, and the risks in some cases depend very much on the nature of the vessel. In the case of a steamer, probably, the risk is larger on the side of the shipowner, but not necessarily so. There may be perishable cargoes, the value of which is very variable, as the price may depend on the speed with which they are delivered on arrival at the port of discharge. Therefore both

parties to the charter-party take their chance of the vessel being able to get into the dock on arrival at the place of discharge within the usual or reasonable time."

I certainly understand from this that the MASTER OF THE ROLLS thought it quite immaterial whether the incapacity to get into the dock was produced by a matter threatening the safety of the ship, or some other matter. In this the Judges of the Court of Appeal all agreed with him, and so do I. But he thought it immaterial whether the delay was long or short, if it would at some time come to an end. In this the Judges of the Court of Appeal differ from him. I think it far the most difficult question [* 50] *in this cause, but I agree with the Judges of Appeal. It is to be observed that the MASTER OF THE ROLLS gives no answer to his own forcible remark which I have before quoted.

Had the words in the charter-party been "as near thereto as she may get," it would have been open to a charterer to contend that the ship must get as far as it was possible, however dangerous it might be. I do not think it could have been successfully so contended, but those who originally framed this clause prevented the possibility of such a contention by inserting the word "safely." In the absence of authority, and construing the words in their ordinary sense, I think that is the only effect of the introduction of the word "safely." I think if the ship cannot get at all it cannot get safely. And there is no authority putting any other construction upon the words. It is singular enough, considering how long this has been a common form, that there is not, as far as I can learn, anything said about its construction either in the text-books, or in any decision in our reports, before *Shield v. Wilkins*, 5 Ex. 304, 19 L. J. Ex. 238, as late as 1850. It would seem that in practice no difficulty had been found in putting a sensible meaning on this clause so as to avoid disputes. Since 1850 there have been a few cases, all of which, I believe, were cited during the argument.

The decision in *Shield v. Wilkins* had no bearing on this case.

In *Schilizzi v. Derry*, 4 E. & B. 873, 24 L. J. Q. B. 193, the ship under the charter-party was bound to proceed to Galatz or Ibrail, or so near thereto as she may safely get and load a cargo of grain. The ship having arrived at the Sulina mouth of the Danube, which is ninety miles below Galatz, and still farther from Ibrail, the master finding the water on the bar unusually

low, so that he could not safely cross the bar till it rose, gave notice that he required the merchant to load his cargo there, a place where it was neither customary nor reasonable to load cargo. The decision, as far as regards this point, was that, as Lord CAMPBELL says (4 E. & B. at p. 886), "the meaning of the charter-party must be that the ship is to get within the ambit of the port, though she may not reach the actual harbour. Now could it be said that the vessel, if she was obstructed in entering the Dardanelles, had completed her voyage to Galatz?"

* In *Metcalf v. Britannia Iron Works Company*, 2 Q. B. [* 51] D. 423, 46 L. J. Q. B. 443, it was actually contended that the shipowner, who had contracted that his ship would go to Taganrog, or so near thereto as she could safely get, and there deliver the cargo, was entitled to require the merchant to take delivery at Kertch, 300 miles from Taganrog, and that the ship had completed her voyage because she was obstructed in entering the sea of Azof, but the Court, both below and in the Court of Error, agreed with the prior decision in *Schilizzi v. Derry*. I think it plain that neither of those decisions touches the present case. Whether the language which Lord CAMPBELL uses is quite the most accurate to express his idea may be doubted, but in the case at bar, it was both reasonable and customary to unload ships in that part of the river to which the *Eurine* had come, and the docks adjoining.

In *Parker v. Winslow*, 7 E. & B. 942, and *Bastifell v. Lloyd*, 1 H. & C. 388, where the charter-party was to proceed to a wharf in a tidal harbor (which could not be reached during the neap tides), or as near as she might safely get, it was held that the ship arriving during the low tides the master was bound to wait for the higher tides, on the ground that his contract was to go to the wharf if, in the ordinary course of navigation, it could be reached, and that the shipowner took on himself the risk of delay from the ordinary course of navigation. The delay in the case at bar was not in the ordinary course of navigation.

Hillstrom v. Gibson, 8 Ct. Sess. Cas. 3d Series, 463, in Scotland, and *Capper v. Wallace*, 5 Q. B. D. 163, 49 L. J. Q. B. 350, were cases where the ship could get to her primary destination if she discharged a part of her cargo so as to lighten her. The majority of the Court of Session thought that as the quantity of cargo which the ship would have had to discharge to enable her to lie always

alloat at Glasgow was small, it was reasonable to do so, and she was bound to do so. Nothing in that case was decided as to the alternative. The Court of Queen's Bench in the latter case held that whether the ship might insist on the whole cargo being taken at the spot where it was necessary to lighten her as being the [* 52] nearest to which she could safely get, or was bound to *go farther, depended on whether it was reasonable under all the circumstances to lighten her to the necessary extent, — which they thought was not the case.

These are all the cases which were cited on the argument, and, as far as I know, all the cases which exist, in which anything has been said as to the construction of this clause. And I do not think any of them is an authority for putting a different meaning on the words from that which they would bear in their natural sense, which, I think, is that which I have already expressed.

But the question whether a prevention causing delay for any time however long, but which would terminate, would amount to a prevention within the meaning of the clause is, I think, a much more difficult question. There is no authority bearing directly on the construction of this clause: except *Copper v. Wallace*, and as that case was decided after the decision of the Court of Appeal in the present case, which was binding on the Court of Queen's Bench, and which it appears was cited on the argument, it may be said that it adds no weight to it. But I think that there are decisions so far analogous, that they establish the principle on which the Judges of Appeal acted, and which I think they applied rightly.

It is quite true that the words of the contract are "as she may safely get;" and nothing is said expressly about getting without unreasonable delay; but in *Moss v. Smith*, 9 C. B. 94, at p. 103, 19 L.J. C. P. 225, Mr. Justice MAULE, speaking of what constitutes a total loss of a ship as against an underwriter, after stating that the shipowner must repair the ship if possible, says, "It may be physically possible to repair the ship, but at an enormous cost, and there also the loss would be total; for in matters of business, a thing is said to be impossible where it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost." "If a ship sustains such extensive damage that it would not be reasonably practicable to repair her, seeing that the expense of repairs would be such that no man of common sense would incur the outlay, the ship is said to be totally lost."

Though the particular case was a policy of insurance, Mr. Justice MAULE speaks generally of mercantile contracts. And on this principle it was held in **Geipel v. Smith*, L. R., 7 Q. [* 53] B. 404, by the whole Court, and in *Jackson v. Union Marine Insurance Company*, L. R., 8 C. P. 572, 42 L. J. C. P. 284, by a majority in the Common Pleas, and in the same case in error, L. R., 10 C. P. 125, 44 L. J. C. P. 27, by a majority of the Court of Exchequer Chamber, that a delay in carrying out a charter-party, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end.

I said in *Geipel v. Smith*, "Very different considerations arise where the cargo is already on board, or, as in *Hudley v. Clarke*, 8 T. R. 259 (4 R. R. 641), is already on the voyage, but while the contract still remains executory I think time is so far of the essence of the contract as that matter which arises to cause unavoidable but unreasonable delay is sufficient excuse for refusing to perform it." I still think that there is a distinction between the cases, for when the shipowner has got the merchant's cargo on board, he cannot simply put an end to his contract; he must do something with the cargo. But in this case, the parties have provided for what is to be done with it. If the ship cannot get into dock, she is to go as near as she may safely get, and there deliver. It certainly seems to me that any cause which would excuse the ship from going into the dock if the contract was wholly executory, must be sufficient to excuse her, and so bring the alternative into operation when the cargo is on board. There was a dissenting minority in *Jackson v. Union Marine Insurance Company*, and some previous authorities are perhaps not quite consistent with the decision. It is no doubt competent to your Lordships to reconsider that case, and decide contrary to it. I think it was rightly decided, but I can only refer your Lordships to the judgment delivered by Baron BRAMWELL in that case, in the reasoning of which I then concurred and still concur, and to which I have nothing to add.

The only remaining question is, whether the evidence in this case is such as to lead your Lordships to concur in the finding of * fact by all the Judges in the Court of Appeal that [* 54] the delay would have been in this case so great as to make

it unreasonable to call on the shipowner to wait. The shipowner would, I think, be bound to go into the dock if he could do so by waiting a reasonable time, but not if he could only do so by waiting an unreasonable time. It is quite true that a question of "reasonable or unreasonable" must always be a question of more or less, and therefore of uncertainty, but that I think cannot be helped. I do not pretend to lay down any precise rule as to what is reasonable or what is not. I think the main elements to be considered are, what would be the effect on the object of the contract; and the damage to each party caused by the delay; and if the result be to lead those who have to decide the question to think (to adopt the language of the MASTER OF THE ROLLS) that it is absurd to suppose that two commercial men entering into a contract to charter a steamer to go to a dock, or as near thereto as she may safely get, should mean that she was to wait outside so long, they ought to find it unreasonable.

In the present case, it was agreed in the written contract that the cargo was to be received as fast as steamer can deliver. And though I do not agree with what is suggested by Lord Justice CORROX, (12 Ch. D. 597), that this casts the duty on the merchant of discharging the vessel as quickly as if she had obtained admission to the Surrey Commercial Docks, it certainly showed that both parties knew that a prompt despatch was of great consequence to the steamer, and, £30 per day being mentioned as demurrage, it was known to each that the loss by a day's delay would be at least that sum, so as to show that a prompt despatch was to a great extent the object of the contract. It does not appear (at least not as far as I can find) distinctly how long it would have taken to unload the steamer into lighters in the river, nor what it would have cost the merchant, but it does appear that the steamer was willing to go into the Millwall Dock, and there she could have been discharged at the same cost as in the Surrey Dock in about the same time. The defendant refused to assent to this, and I do not think he was bound to assent. He refused because he thought, not that the cargo would be worse, but that the value [* 55] * of it would be diminished so as to make him a loser by about £120. Assuming this to be so, he required the steamer to wait for a period uncertain in its length, but certainly exceeding five weeks; and five weeks at £30 a day would represent a loss to the shipowner of more than £1000. I cannot think that reasonable.

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The result is that I come to the conclusion that the judgment should be affirmed, and the appeal dismissed with costs.

LORD WATSON : —

My Lords, this is a case of importance, seeing it involves the construction of a clause which has long been of common occurrence in contracts of affreightment. By a charter-party, dated the 21st of June, 1877, it was *inter alia* agreed that the steamship *Euxine*, after taking on board a cargo of timber in the Baltic, "being so loaded shall therewith proceed to London Surrey Commercial Docks, or as near thereto as she may safely get, and lie always afloat and deliver the same," &c. No lay-days proper were stipulated in the charter-party, although it was agreed that there should be ten days on demurrage, "over and above the said laying days," the apparent inconsistency being due to the fact that the charter-party consists of a printed form, partly filled up in writing. It was provided that the cargo was to be received at the port of discharge "as fast as steamer can deliver," Sundays and legal holidays excepted, and also that it was to be brought to and taken from alongside the ship at merchant's risk and expense.

The *Euxine* reached the port of London with her cargo in safety; and, on the 4th of August, 1877, having been refused admittance to the Surrey Commercial Docks, was moored at the Deptford Buoys, outside the dock entrance.

It appears from evidence laid before the MASTER OF THE ROLLS that the Surrey Dock is used exclusively for the purposes of the timber trade, that in it steam vessels are unloaded at discharging berths alongside the quays, and that the dock authorities do not permit any steamer to enter until there is a vacant berth to receive her. Accordingly they refused to admit the *Euxine*, not on account of there being no room for her to lie in the dock, but because the discharging berths for steamers were then full and were engaged for some time to come.

* The 5th of August was a Sunday, and the 6th a legal [*56] holiday; but on the 7th the shipowners intimated to the charterers that the *Euxine* was ready to discharge her cargo, and requested that lighters should be sent alongside for that purpose. Upon the 8th of August the charterers refused to take delivery as required, the ground of their refusal being that the *Euxine* was bound to wait at owner's risk until there was room for her to discharge in the Surrey Commercial Docks. At this time, as appears

from the evidence, the dock authorities were unable to specify within what period they could give the *Euxine* a berth for discharge.

After the refusal of the charterers to accept delivery, the owners landed the cargo by means of lighters, and placed it in the custody of the Surrey Docks Company, and thereafter raised the present action against the charterers for freight, demurrage, and other charges and expenses incurred by them in discharging and landing the cargo. The charterers, besides denying liability, preferred a counter-claim of damages for breach of contract.

The MASTER OF THE ROLLS, on the 23d of May, 1878, gave judgment, dismissing the action, with costs, on the charterers' undertaking to pay the freight and landing charges; but on the 8th of August, 1879, the Court of Appeal reversed that judgment, and declared "that the voyage of the *Euxine* ended and the lay-days began to run from the time when the ship took up her position at the Deptford Buoys, and was ready to deliver cargo." And it was ordered that the freight and what damages they had sustained by reason of the detention of the ship and the delay and increased expense of delivery, be paid to the owners. The present appeal has been brought by the charterers against the judgment and order of the Court of Appeal.

I have made no reference to the communications which passed between the law agents of the parties subsequent to the 8th of August, because these appear to me to have no bearing upon the case as presented to the House. Various questions were argued in the Courts below, but the only issue raised between the parties in this appeal is, whether the *Euxine* on the 7th of August, 1877, had, as was found by the Court of Appeal, completed her voyage in terms of the charter-party.

It is not maintained by the respondents, the owners of [* 57] the *Euxine*, that the vessel had proceeded to the Surrey Commercial Docks. On the contrary, their contention is, that it had become impossible — in the sense of the charter-party — for her to obtain admission to the dock, and consequently that the *Euxine* must be held to have completed her voyage whenever she reached her moorings at the Deptford Buoys, seeing that she was then as near to the dock as she could safely get and lie afloat. The appellants, on the other hand, contend that by the conditions of the charter-party the *Euxine* was bound to proceed to her

primary destination, unless prevented by some permanent physical obstacle. They farther maintain that the circumstances which occasioned the exclusion of the *Euxine* did not constitute an obstacle either of a physical or of a permanent character, and that the vessel was therefore bound to wait, at owner's risk, until the obstruction was removed, and then to enter the dock for the purpose of discharge.

Both parties seemed to concede, and I think it may be taken as settled law, that when, by the terms of a charter-party, a loaded ship is destined to a particular dock, or as near thereto as she may safely get, the first of these alternatives constitutes a primary obligation; and, in order to complete her voyage, the vessel must proceed to and into the dock named, unless it has become in some sense "impossible" to do so. It is only in the case of her entrance into the dock being barred by such "impossibility" that the owners can require the charterers to take delivery of her cargo to a place outside the dock. When a vessel in the course of her voyage is stopped, by an impediment occurring at a distance from the primary place of discharge, it has been decided that she cannot be held to have got "as near thereunto as she could safely get," and therefore cannot claim to have completed the voyage in terms of the second alternative. *Schilizzi v. Derry*, 4 E. & B. 873, 24 L. J. Q. B. 193, also *Metculfe v. Britannia Ironworks Company*, 2 Q. B. D. 423, 46 L. J. Q. B. 443. It was observed by Lord Chief Justice CAMPBELL in *Schilizzi v. Derry* that the meaning of these words in the charter-party "so near the port of landing as the ship may safely get," "must be that she should get within the ambit of the port, though she may not be able to enter it." In the present case it does not admit of dispute that the *Euxine*, *when lying at the Deptford Buoys [* 58] was as near to the Surrey Commercial Docks as she could safely get, if it be assumed that it had become within the meaning of the charter-party impossible for her to get into the dock.

The appellants maintained that there can be no impossibility within the meaning of the contract unless the vessel is stopped by an impediment which is both physical and permanent; but I greatly doubt whether, in any fair construction of the charter-party, it is necessary that the obstruction should be of a purely physical character; and I also doubt whether there be any foundation in fact for the appellant's contention. The exclusion of the

Euxine from the Surrey Docks in August, 1877, was owing to a rule made by the statutory authorities entrusted with the administration and control of the dock. It is not suggested that the rule was in excess of their powers, or that it was not capable of being legally enforced. And I am of opinion that an order emanating from the proper authority, which, if disregarded, would lead either to the dock gates being shut against the vessel or to her being turned summarily out of the dock if she did get into it, does in reality constitute a physical obstacle.

The controversy between the parties appears to me, accordingly, to be narrowed to this issue, — whether the obstacle which the *Euxine* encountered was of such permanency as to render it impossible, within the meaning of the charter-party, for her to get into the Surrey Commercial Docks.

In providing alternative destinations, the charter-party does not express the condition upon which the second alternative becomes substituted for the first. It does not in terms express any distinction between the alternatives, and that the first is to be regarded as the primary destination to which the chartered vessel must, if possible, proceed, is, I apprehend, an inference based upon what is known to be the ordinary course of shipping business, and, on the presumption that both parties would, from considerations of mutual interest, have agreed to that effect if they had made it matter of express contract.

The question now before the House must also, in my opinion, be determined by some such reasonable considerations. A permanent obstacle can in no reasonable sense be held to mean [* 59] an *obstacle which will remain forever. There must in every case be some limit of time within which an obstacle ceasing to exist cannot be regarded as permanent, and beyond which a continuing obstacle ceases to be temporary. It may be very difficult to fix that limit, which will obviously vary with the circumstances of each case and the terms of the charter-party; but I do not think the same difficulty exists in regard to the principle upon which it ought to be determined. I have always understood that, when the parties to a mercantile contract, such as that of affreightment, have not expressed their intentions in a particular event, but have left these to implication, a Court of Law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which

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is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charter-party which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.

My Lords, I am of opinion that the question at issue in the present appeal must be solved in that way, and that the *Euxine* cannot be held to have completed her voyage on the 7th of August, unless it be established that the delay which would have taken place before she was admitted to the Surrey Docks would have been so great that the parties, had they anticipated and provided against its occurrence on the 21st of June, 1877, would not, as reasonable men of business, have arranged that the vessel should wait outside the dock at owner's risk until a berth was ready for her. I adopt the view, of Lord Justice BRETT (12 Ch. D. at p. 593), that the shipowner must bring his ship to the primary destination * named in the charter-party, " unless [* 60] he is prevented from getting his ship to that destination by some obstruction or disability of such a character that it cannot be overcome by the shipowner by any reasonable means, except within such a time as, having regard to the adventure of both the shipowner and the charterer, is, as a matter of business, wholly unreasonable.

None of the authorities cited in the course of the argument, with the exception of two which I shall shortly notice, appears to me to have any material bearing upon the question before the House.

Most of these authorities related to the question whether, had she been permitted to enter the dock, the *Euxine* would have completed her voyage, and would have been at the charterers' risk as soon as she was moored there, or not until she reached a discharging berth alongside the quay. There being no proper lay-

days stipulated in her charter-party, it might in that event have been plausibly contended that the *Eurine* fell within the principle of decision in *Burmester v. Holyson*, 2 Camp. 488 (11 R. R. 776), and not within the rule established in *Randall v. Lynch*, 2 Camp. 352, (11 R. R. 727). But it does not appear to me to be necessary to decide the point, because the *Eurine* never did get into dock; and I do not think that its decision one way or another would be of any assistance in determining whether it was impossible for her to get there.

The cases of *Parker v. Winslow*, 7 E. & B. 942, and *Bastifell v. Lloyd*, 1 H. & C. 388, come somewhat nearer to the present, although their bearing upon it is not very direct. It was there held that the shipowner, having contracted in the knowledge, or at least with the means of knowing, that the primary place of discharge specified in the charter-party was a tidal port, was bound to take the risk of the tides being unfavourable when his vessel arrived, and to complete the voyage by proceeding to that place at spring-tides. It appears to me to be a reasonable inference from these decisions that, no impediment arising in the ordinary course of navigation to a particular port or dock, or arising in the usual and ordinary course of management of a par-

ticular port or dock, and not lasting beyond ten days or a [* 61] fortnight, is to be regarded as a permanent obstruction, * but

that the ship must wait and proceed to its primary destination before the charterer can be required to take delivery of the cargo. But I do not think that much aid can be derived from these decisions in determining what shall be held to constitute a permanent obstacle in a case like the present.

In *Geipel v. Smith*, L. R., 7 Q. B. 404, 41 L. J. Q. B. 153, and *Jackson v. Union Marine Insurance Company*, L. R., 8 C. P. 572; L. R., 10 C. P. 125, certain points were decided in regard to the effect of unreasonable delay arising from causes not imputable to any of the parties, and so far these cases appear to me to have a very close analogy to the present. In each of these cases there had been an impediment in the way of the chartered vessel, in consequence of which she did not go to her port of loading. That impediment, which arose in the first case from a blockade, and in the second from shipwreck, was temporary in this sense, that it would have been quite possible for the one vessel to have proceeded to the place of loading after the blockade was raised, and

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for the other after her repairs were completed. In *Geipel v. Smith* the charterer raised an action of damages for breach of contract against the shipowner; but the Court of Queen's Bench, being satisfied of the fact that the ship could not have reached her destination within a reasonable time without running the blockade, held in law that the contract of the charter-party was thereby discharged. In *Jackson v. Union Marine Insurance Company* the shipowner preferred a claim for lost freight against the underwriters, who resisted it on the ground that the charter-party remained in force notwithstanding the mishap which had befallen the ship, and that the plaintiff was entitled to demand either specific implement or damages from the charterer. At the trial of the cause, the jury, in answer to questions put to them by the presiding Judge, found that the time necessary for repairing the ship, so as to make her a cargo-carrying ship, was so long as to make it unreasonable for the charterers to supply the agreed-on cargo at the end of such time; and also that the time was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the charterers. A verdict was entered for the defendants, leave being reserved to plaintiff; and the case was thereafter argued on a rule before the Court of

* Common Pleas, under an agreement that the defendants [* 62] should be at liberty to argue that the findings of the jury were against the weight of evidence. The majority of the Common Pleas took substantially the same view of the facts as the jury had done, and held that the delay occasioned by the getting off and repair of the ship was so unreasonable as to terminate the adventure, and that the plaintiff was accordingly entitled to recover under his policy on freight. And, upon appeal, the Court of Exchequer Chamber, with a single dissentient voice, affirmed the judgment. It was precisely the same question which arose for decision in these two cases; and, if I understand them aright, it was in both decided that this delay in loading a cargo would have been so unreasonable, so inconsistent with the presumable views and intentions of both the contracting parties, that the charter-party could no longer be held binding on either of them. No doubt in these cases the contract had not passed the executory stage; but seeing that unreasonable delay in reaching the place of loading, when occasioned by no fault of either of the parties, is effectual to discharge such a contract altogether, I conceive that,

a fortiori, a similar delay in reaching the primary place of discharge ought to have the effect of enabling the vessel to complete her voyage by proceeding to the alternative destination.

That leaves only the question of fact, whether the state of the Surrey Commercial Docks, in August, 1877, was such as would have unreasonably delayed the discharge of the *Euxine* within that dock. Had I been called upon to decide that question in the first instance, I should have had great difficulty in coming to any conclusion satisfactory to my own mind. I agree that the question is sufficiently raised by the pleadings, and that it was in view of the parties, and was actually discussed in the course of the argument, which is interwoven with the evidence in this case, although it is not noticed in the judgment of the MASTER OF THE ROLLS. But I cannot resist the impression that, in their anxiety to prove or disprove the alleged custom of the port, which has now been eliminated from the case, the parties have omitted to direct their evidence to many points upon which it would have been, in my opinion, desirable that a Judge, unacquainted with the port of London, should receive information. In the absence [* 63] *of such information, I have done my best to sift the evi-

dence, and the result is that I am not disposed to differ from the Court of Appeal. I think it may be taken as proved, that the block occasioned by the great demand for steamship berthage in August and September, 1877, although that was rapidly becoming the normal condition of the Surrey Docks in the preceding months of June and July, was due not to ordinary but to exceptional causes. And seeing that, on the 4th of August, the authorities could not undertake, within a month, or any other given time, to admit the *Euxine* into the dock, and that even on the 23d of August they were not in a position to give a more definite or satisfactory undertaking, it appears to me to be safe to conclude that the length of time for which the *Euxine* must have waited in the port of London, in order to discharge in the Surrey Docks, would have been in excess of any delay which either the shipowner or the charterer, at the time of entering into the charter-party, could reasonably have contemplated.

I am therefore of opinion that the judgment of the Court of Appeal ought to be affirmed.

The LORD CHANCELLOR (LORD SELBORNE): —

My Lords, having had an opportunity of seeing in print the

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opinions which have just been delivered by my two noble and learned friends who have addressed the House, and entirely agreeing with them, I think it unnecessary to add anything more.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 13th January, 1881.

ENGLISH NOTES.

The statement that where the ship contracts to proceed to certain "docks," she must enter them, is further illustrated by *Tapscott v. Balfour* (1872), L. R., 8 C. P. 46, 42 L. J. C. P. 16, 27 L. T. 710, 21 W. R. 245, which has already been referred to on another point. (See Notes to Nos. 3 & 4 p. 215, *ante*.) There the charter-party provided that the ship should proceed to any Liverpool or Birkenhead dock as ordered by the charterers and there load a cargo of coal in the usual and customary manner. She was directed to proceed to the W. Dock at Liverpool, but owing to the dock regulations was not allowed to enter for some time after she was ready to do so. It was held, that the lay-days did not commence until she had entered. The charterers argued that the stipulation to load in the usual and customary manner implied that the days were not to run until the vessel had reached the usual loading place in the dock; but the Court was of opinion that these words referred to the mode and not to the place of loading.

Arrival off the dock gates, however, was held sufficient in *Ashcroft v. The Crow Orchard Colliery Co.* (1874), L. R., 9 Q. B. 540, 43 L. J. Q. B. 194, 31 L. T. 266, 22 W. R. 825. In that case the vessel was chartered to load a cargo of coal at Liverpool "to be loaded with the usual dispatch of the port or if longer detained to be paid 40s. per day demurrage." The loading was to take place at the Bramley Moore or Wellington docks, by the regulations of which no coal agent was allowed to load more than a certain number of vessels at the same time. The charterers, who acted as their own agents, had so many prior charters in their books that the vessel was prevented from entering the docks for thirty days after she was ready to do so. It was held that the charterers were absolutely bound to load "with the usual dispatch of the port;" that the vessel had not been so loaded, and therefore the charterers were liable.

To a similar effect appears to be the decision in *Davies v. McVeagh* (1879), 4 Ex. D. 265, 48 L. J. Ex. 686, 28 W. R. 143, where the ship was to load a cargo of coal "to be loaded and discharged in nineteen running days, or if longer detained to pay £4 per day demurrage." By a memorandum it was stated "vessel to load in B. Moore, or Wel-

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lington Dock, High Level." — owing to the regulations referred to in the last case the ship would have been kept outside for a fortnight, but as a matter of favour she was allowed to enter at once. The Court held that the days counted from the time of the vessel's admission, and inclined to the opinion that the actual admission was not material when once she was ready to come in. The soundness of this decision has, however, been called in question in *Murphy v. Coffin* (1883), 12 Q. B. D. 87, 32 W. R. 616, by MATHEW, J., who observes that the attention of the Court does not appear to have been called to the fact that the High Level Dock was the place of destination.

The second part of the rule is further supported by *Allen v. Coltart* (1883), 11 Q. B. D. 782, 52 L. J. Q. B. 686, 48 L. T. 944, 31 W. R. 841, from which it appears that where the contract is that the ship shall proceed with a cargo "to discharge in a dock as ordered on arriving if sufficient water, or so near thereto as she may safely get always afloat," the ship is only bound to discharge in the dock named if there is sufficient water there at the time the order is given. In *Horsley v. Price* (1883), 11 Q. B. D. 244, 52 L. J. Q. B. 603, 49 L. T. 101, 31 W. R. 786, a ship was chartered to unload at S., or "as near thereto, as she might safely get at all times of tide and always afloat," and for delay in unloading the charterers were to pay demurrage. The ship was prevented by the state of the tide from reaching S. for four days after she arrived at the nearest point where she was able to float. This was held a sufficient arrival at S. to found a claim for demurrage.

A stipulation that a ship shall proceed to a certain place, or as near thereto as she can safely get, and there load a full cargo, means such a place to which she can safely get and from which when loaded, she can safely get away. *Shield v. Wilkins* (1850), 5 Ex. 304, 19 L. J. Ex. 238.

AMERICAN NOTES.

Damages are recoverable for delay in unloading upon vessels when the cargo could have been more quickly discharged into cars. *Peters v. Miller*, 27 Federal Reporter, 474.

If a vessel is detained in the stream until her lay-days have begun, and the consignee then begins her discharge by lighters, it may be presumed by the vessel that the delay incident thereto will be compensated for by the consignee. *The Dictator*, 30 Federal Reporter, 637.

No. 8. — Dickinson v. Martini. Court of Session, 4th Ser. 1185. 1186. — Rule.

No 8. — DICKINSON v. MARTINI.

(1874.)

No 9. — THE ALHAMBRA.

(C. A. 1881.)

RULE.

WHERE a ship is chartered “to a safe port in the United Kingdom or so near thereto as she may safely get always afloat;” and the merchants order the ship to proceed to a port to which she cannot get without lightening by partially unloading, and the ship sails for that port accordingly; it lies upon the merchants to provide facilities for lightening the ship at the place where this is usually done, and the time spent in lightening counts as lay-days in favour of the shipowner.

But the shipowner is not bound under such a charter-party to proceed to a port which she could not, without previously lightening, safely reach and lie there always afloat.

Dickinson v. Martini.

Court of Session, 4th Series, Vol. I. pp. 1185-1189.

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Ship. — Demurrage.

A ship was chartered to “proceed to a safe port in the United Kingdom, [1185] or as near thereunto as she may safely get always afloat at any time of the tide.” She was ordered to Glasgow, but owing to her draught of water had to discharge part of the cargo off Greenock before proceeding to Glasgow. In an action for demurrage, *held* that the voyage was completed at Greenock, so far as regarded the cargo discharged there, and that the time spent in lightening at Greenock was to be included in the lay-days.

By charter-party between the agent for William Dickinson, shipowner, Newcastle, owner of the steamer *Redewater*, and A. Kohan, merchant, it * was agreed that the *Rede-* [* 1186] *water* should load a cargo of grain at Odessa, and should “therewith proceed to a safe port in the United Kingdom, or so near thereto as she may safely get, always afloat at any time of

the tide, calling at Cork, Falmouth, or Plymouth, at the master's option for orders (which are to be given in twelve hours, or lay-days to commence), as follows, viz., fourteen running days to be allowed, . . . for loading and unloading, and ten days on demurrage over and above the said laying days, at £35 per day."

After loading, which occupied four days, the *Redewater* proceeded to Falmouth, where she remained four days waiting for orders. On 4th September, H. Martini and Co., merchants in Glasgow, who had purchased the cargo, ordered the ship to proceed to Glasgow. She arrived at the Tail of the Bank at Greenock on 7th September. As she drew too much water with her full cargo to discharge at Glasgow, the owners and consignees agreed that she should discharge by lighters in the roadstead at the Tail of the Bank until sufficiently lightened to proceed. She remained there fifteen days, reached Glasgow on the 23d, and completed her discharge in the four days following.

The owners claimed demurrage for ten days, as per charter-party, from 14th to 23d September, at £35 per day, and for four days more at the same rate. The consignees refused to pay, and the owner raised this action.

[The LORD ORDINARY (the Judge of first instance) gave judgment for £490, being demurrage for 14 days beyond the lay-days stipulated in the charter-party and appended to his judgment the following note:—]

"This action raises some questions of general interest and importance relative to the computation of lay-days and of demurrage days in the case of a port like Glasgow, where vessels having a deep draught of water, and which require to be always kept afloat, are in use to lighten or discharge part of their cargo in the roadway at Greenock, and then proceed with the remainder to discharge it at Glasgow.

"Previous to the decision in the case of *Hillstrom v. Gibson and Clark* (2 Feb. 1870), Court of Session Rep., 3d Series, [*1187] Vol. 8, p. 463, * it was considered a doubtful point whether a vessel which had what is called the floating clause in her charter-party, — that is, which stipulated for being kept afloat at all times of the tide, and which drew, when loaded, so much water that she would not float in Glasgow harbour at low tide, — was bound to go up to Glasgow at all, or whether the consignees were not bound to take delivery of her whole cargo at

Greenock, or at the Tail of the Bank. In *Hillstrom v. Gibson and Clark* it was decided, in accordance with the custom, that such a vessel was bound to lighten at the Tail of the Bank to such an extent as would keep her afloat in Glasgow harbour, and then to proceed to Glasgow and discharge there the remainder of her cargo.

“In *Hillstrom's case* no question occurred about the computation of lay or demurrage days, the whole delay having been occasioned by the master's improper refusal to lighten and proceed. In the present case this question of computation directly arises.

“The defender in the present case broadly contended that in no case could the lay-days commence to run until the vessel had reached her port of destination, — that is, the port of Glasgow. He maintained, with great ingenuity, that the lightening at Greenock was an incident of the voyage, — a necessity which lay upon the shipmaster, and without which the voyage could not be completed, and that any delay occasioned by the lightening at Greenock, by whosoever fault, was only a lengthening of the voyage, and could not be counted as either lay-days or demurrage days, neither of which can begin to run till the vessel has completed her voyage and reached Glasgow, her port of discharge.

“Alternatively, the defender's counsel maintained that even if damages could be demanded for unnecessary detention at Greenock by the defender's fault, such claim could only be made good in an action of damages at common law, and not in the present action, which, he insisted, was a mere action for demurrage.

“Notwithstanding the ability and ingenuity, however, with which these pleas were maintained, the LORD ORDINARY thinks they are not well founded. He thinks it is sufficiently proved that the pursuer's vessel was detained fourteen days beyond her lay-days before she was discharged at Glasgow, and that the pursuer is fairly entitled to the liquidated rate of demurrage, being £35 a day, for these days. The demurrage days are limited by the charter-party to ten, so that if more damage had resulted the pursuer was not confined to £35 a day for the last four days; but no point was made by either party on this, the liquidated demurrage of £35 per day being held as a fair measure of the damage, if damage or demurrage is due at all.

... “In the first place, and in reference to the form of the action, the LORD ORDINARY is of opinion that the pursuer is entitled to make good his claim in the present action whether

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that claim be considered as demurrage strictly so called, or whether the claim be regarded as one for damages at common law. In truth, demurrage is just damages liquidated by the agreement of parties. Demurrage is simply damages for detention at the agreed-on rate of damage, so much per day. Generally the demurrage days are limited, because the liquidated rate of demurrage is in the common case somewhat less than the actual damage which may be caused by the detention. But whether this be so or not, the only effect of the limitation of the demurrage days is that the damages for farther detention are not to be held as liquidated, but may be proved according to their actual amount, whatever that amount may be. The character of the action, however, is the same, whether the damages are liquidated by agreement of parties or not, and it would be absurdly strict to hold that a separate or a different action was required, according as the damages were liquidated or not. Even if an amendment were required, the LORD ORDINARY would at once have allowed it under the recent statute, so as to determine in the present action the true question between the parties; but no amendment seems necessary.

[1188] “The next question is, — Are the defenders liable for the detention which admittedly took place at Greenock? The LORD ORDINARY thinks they are. It is a mistake to say that the lay-days never commence to run till the vessel has arrived at her final or ultimate port of destination. In this very case four lay-days were exhausted at Falmouth, waiting for orders, and although this was by special stipulation, the same result would have happened if the detention is caused by the merchant's fault. In truth, the real question seems to be, by whose fault was the detention occasioned? and though it is quite supposable that delicate questions might arise where the detention was accidental, and arose from causes not imputable to either party, the present case stands quite clear of any such delicacy, for the LORD ORDINARY holds it to be established in point of fact that the detention at Greenock was occasioned by the fault of the defenders.

“It seems to be clear that when a vessel like the *Redewater* requires to lighten at Greenock by discharging part of its cargo there, it is the duty of the consignee to take delivery at Greenock of that portion of the cargo requiring to be there discharged. This was admitted by the present defenders. It was also assumed in the case of *Hillstrom v. Gibson*, and it could hardly be disputed.

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having regard to the custom of the port. If it could have been shown that no duty lay upon the consignee at Greenock, that the captain was bound to find barges or lighters for himself, and to forward the cargo thereby to the consignee at Glasgow, the case would have been totally different. No such case, however, was made for the defenders, and in the LORD ORDINARY'S opinion any attempt to do so would have been hopeless.

“Assuming, then, that the consignees — that is, the defenders — were bound to take partial delivery at Greenock over the ship's side, and to supply the barges and other appliances necessary for this purpose, there is really an end of the case, for the LORD ORDINARY thinks it is sufficiently proved that the delay and detention at Greenock was wholly caused by the fault of the defenders.”

On appeal from this judgment to the First Division of the Court the following authorities were cited in argument:—

Hillstrom v. Gibson (2 Feb. 1870), Court of Session Rep., 3d Series, Vol. 8, p. 463; *La Cour and Watson v. Donaldson and Son* (22 May, 1874), Court of Session Rep., 3d Series, Vol. 8, p. 912; *Brereton v. Chapman* (24 May, 1871), 7 Bing. 559; *Abbott on Shipping*, 266; *Ford v. Cotesworth* (17 Dec. 1868), L. R., 4 Q. B. 127; *McLaren's Bell's Com.* 622; *Abbott on Shipping*, 269; *Whitwell v. Harrison* (18 Feb. 1848), 2 Ex. 127.

The following judgments were pronounced:—

LORD JUSTICE CLERK (Lord MONCREIFF): This question arises under a charter-party between the owner of the *Redeuter*, a large vessel with a considerable draught of water, and a merchant named Kohan. The ship loaded her cargo at Odessa, and proceeded to Falmouth, where she arrived on 31st August, 1872. She was detained there four days, and received orders on the 4th September. There being no port of discharge mentioned in the charter-party, that was left to the option of the consignees. It seems that, after the ship arrived at Falmouth, the cargo was purchased by merchants in Glasgow. The purchasers, as holders of the bills of lading, had the right to give orders to the master, and they named Glasgow as the port of discharge. The master accordingly proceeded thither, and reached the Tail of the Bank on 7th September. A doubt arose whether there was enough of water for the vessel to go up to Glasgow. In the end the consignees and the master came to an arrangement by which a certain amount of the cargo should be delivered at Greenock in order * to [* 1189]

lighten the ship. That was done to the extent of about half the cargo, and the vessel proceeded up the river. A claim of demurrage is made by the owners, in which the time that the ship was detained at Greenock is taken into account.

The first question is, whether this claim is well-founded, or whether the lay-days did not begin to run until the vessel came to the port of discharge.

The LORD ORDINARY has decided in favour of the owner. I entirely agree with him. The argument for the consignees is rested upon an obvious fallacy. They maintain that the delivery at Greenock was not complete delivery in any sense, but ought to be likened to something done in the course of a voyage for the sake of the preservation of the rest of the cargo. The whole argument is liable to exception. There was no obligation in the charter-party upon the master to go to the port of Glasgow. He undertook to be at the consignee's order, but it was also stipulated that the ship was to be always afloat, and to get as near the port as she safely could. Thus when the consignees ordered him to discharge at Glasgow it was implied, "if you can." Under these circumstances he had not only a right to discharge at Greenock, but it was his duty to do so when ordered by the consignees to go to Glasgow. The case of *Hillstrom* is conclusive of his obligation, and of his right also in this respect. The only doubt there was whether the master was bound to give partial delivery. It was held that he was bound so to lighten the ship as to enable him to finish the voyage. Here it is impossible to dispute the right and duty of the master to discharge part of the cargo at Greenock, and I held that, to the extent of the amount so delivered, the voyage was completed. I am unable to see how the consignees, after ordering the master to a port where he could not lie afloat, can claim the benefit of the time which was spent in lightening the ship so as to enable it to carry out their orders. It is in vain to assimilate this to a case of jettison in which the contract of carriage is never performed. Here the contract was in part brought to an end by performance, and the freight was earned.

On the second question, namely, whether the master unduly delayed to proceed up the river, I entirely agree with the LORD ORDINARY.

On these grounds, I have no hesitation in proposing that we should affirm the interlocutor.

Nos. 8, 9. — Dickinson v. Martini; The Alhambra. — Notes.

LORD BENHOLME. When Glasgow was designated by the merchants as the port of discharge they must be held to have known that a vessel drawing so many feet of water was not safe to proceed up the river, and could not be so until she was lightened at the Tail of the Bank. It was strongly pleaded to us that the process of lightening took more time than it need have done owing to the want of lighters, that it was the duty of the captain to supply these, and therefore that demurrage is not due. I am clearly of opinion that it was the duty of the merchants, knowing the circumstances, to have provided for the supply of the lighters, and if there was increased demurrage in consequence of the slow operations they are themselves responsible. I quite concur in the general views expressed by your Lordship.

LORD NEAVES and LORD ARMIDALE concurred.

The judgment of the LORD ORDINARY was therefore affirmed.

The Alhambra.

This case is fully reported as No. 8 of "Custom" 8 R. C. 351.

ENGLISH NOTES.

It is to be noted that at some ports it is customary for ships of unusual burdens, when they are as near the port as they may safely get, to lighten in order that they may enter the port. Where a ship is bound to such a port and can by lightening reach the usual discharging place therein, she must lighten in accordance with the custom and proceed to that place.

The computation of time in such a case is determined by the contract between the parties, explained by the custom of the port.

The most usual method of calculation appears to be to count the time occupied in lightening and discharging, but not the time occupied in passing between the place of lightening and that of discharge.

Thus where a ship was chartered to take a cargo to Glasgow "or as near thereto as she can safely get, and lay afloat at all times of the tide and deliver the same and so end the voyage," but drew too much water to lie afloat there at low tide, a custom of the port according to which the merchants might at their own expense lighten the ship at the Tail of the Bank at Greenock, twenty-two miles from Glasgow harbour, was held by a Scotch Court to be a reasonable custom. *Hillstrom v. Gibson* (1870), Court of Session Rep., 3rd Series, vol. 8, p. 463. That decision was followed in the subsequent Scotch case of *Dickinson v. Martini*, the principal case, No. 8, p. 261, *ante*.

A charter-party provided that the ship should be ordered to a port where she could discharge "always afloat," and by the bill of lading she was ordered to the port of "Newry." Owing to her draught it was necessary to discharge part of her cargo at the "Pool" in Carlingford Roads, ten miles from Newry, and another part at the Victoria lock of the Newry canal, to enable her to go through the canal to the "Albert basin" at Newry. In an action for demurrage, evidence was brought of a usage of the port according to which vessels of too great draught to enter the Albert dock might lighten at the other places named, the time occupied at these places being counted, but not that spent in passing between them; and this evidence was accepted and acted upon by the Irish Courts of Queen's Bench and Exchequer Chamber. *Caffarini v. Walker* (1876), 10 Ir. R. C. L. 250, 9 Ir. R. C. L. 431. That case was followed in *McIntosh v. Sinclair* (1877), 11 Ir. R. C. L. 456, a case which also arose at the port of Newry. Similarly a custom of the port of Gloucester according to which grain cargoes were discharged at the basin within the city, and vessels of too great burden to come up the canal to the city were lightened at Sharpness, the lay-days counting during the process of lightening, but not during the passage up and down the canal, was held a reasonable custom and not inconsistent with an express provision in the charter-party as to running days; *Nielson v. Wait*. (C. A. 1885), 16 Q. B. D. 67, 55 L. J. Q. B. 87, 54 L. T. 344, 34 W. R. 33.

At some ports, however, it is necessary for the vessel to reach the final place of discharge before the lay-days begin to count. Thus in *Brereton v. Chapman* (1831), 7 Bing. 559, it was held that the ship must reach the usual place of discharge within the port, and the previous lightening was treated as being for the purpose of navigation only. In *McIntosh v. Sinclair*, *supra*, the merchants of Newry tried to make out a custom by which time would not run until the Albert Dock was reached; but the Court held that, as the "Pool" had been proved to be the usual place at which vessels of considerable tonnage commenced discharging, the custom sought to be proved could not be good.

AMERICAN NOTES.

In *Olivari v. Merchant*, 18 Federal Reporter, 554, the charterer was held liable for demurrage in delaying the discharge of the vessel by providing unsuitable lighters instead of having the cargo discharged on the pier.

No. 10. — PORTEUS *v.* WATNEY.

(C. A. 1878.)

RULE.

WHERE a bill of lading stipulates for delivery “on paying freight and all other conditions as per charter-party;” the owners of the goods, consignees or indorsees under the bill of lading, are liable for any demurrage stipulated by the charter-party.

Porteus v. Watney.

3 Q. B. D. 534-544 (s. c. 47 L. J. Q. B. 643; 39 L. T. 195; 27 W. R. 30).

Charter-party. — Bill of Lading. — Demurrage. — Consignee prevented from discharging by the Delay of other Consignees.

A charter-party, entered into between the plaintiffs and B. & Co. for [534] the conveyance of grain from C. to L., stipulated that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days on demurrage at £35 a day. The vessel having been loaded, one of the bills of lading was indorsed to the defendants. The defendants' grain was stowed at the bottom of the main hold, and that of the other shippers on the top of it. The bill of lading, indorsed to the defendants, contained the words “paying freight for the same goods and all other conditions as per charter-party.” Owing to the consignees whose grain was placed on the top of the defendants' having failed to take away their goods within the lay-days, the defendants were unable to obtain delivery of their grain, and three days' demurrage was incurred: —

Held, affirming the judgment of LUSH, J., that the defendants were liable for the demurrage, although they were prevented from getting their goods by the delay of other consignees.

Action to recover £105 for three days' demurrage of the steamer *Stamford* at the port of discharge.

At the trial before LUSH, J., at the Hilary Sittings in London, the following facts were proved: A charter-party was entered into between the plaintiffs, the owners of the *Stamford*, and Brand & * Co., for the conveyance of a cargo of grain [* 535] from Cronstadt to London, and by which it was stipulated that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days on demurrage over and above the said loading and delivery days, at £35 day by day. The captain to sign bills of lading as presented without

prejudice to the charter-party, but at not less than chartered rate, and to have an absolute lien on the cargo for all freight, dead freight, and demurrage. The cargo to be brought and taken from alongside the ship at merchant's risk and expense.

The vessel took on board a full cargo of grain from several shippers, and a portion of it was consigned to the defendants. The defendants' grain was stowed at the bottom of the main hold, and that of other shippers on the top of it. Bills of lading for portions of the cargo were given to the several shippers, and one of which, for a part of the cargo, was indorsed to the defendants, and contained the words, to be delivered to order or to assigns "on paying freight for the said goods and all other conditions as per charter-party." Seven days had been consumed at the port of loading, so that seven working days remained for unloading at the port of discharge. Owing to the consignees of the portions of cargo placed on the top of the grain of the defendants having failed to take away their goods in proper time, the defendants were unable to obtain delivery of their grain, and in consequence demurrage amounting to three days was incurred. The learned Judge directed the judgment to be entered for the plaintiffs for £105 and costs (3 Q. B. D. 227).

May 4. Butt, Q. C., and Mathew, for the defendants, contended that the words in the bill of lading "paying freight for the same goods and all other conditions as per charter-party" must receive some limited construction; that it would be too extensive a construction to hold that they put the consignee in the place of the charterer, for it never could have been intended to make him liable to every dispute between the charterer and the shipowner. The words therefore ought to be limited to conditions having reference to the particular goods.

[* 536] * May 16, 17. A. L. Smith, and R. T. Reid, for the plaintiffs, contended that the charter-party was incorporated in the bill of lading, and that the consignee was bound before he received delivery of his goods to fulfil the conditions referred to, besides the payment of freight.

The cases cited in the arguments are mentioned in the judgments.

Cur. adv. vult.

July 2. The following judgments were delivered.

THESIGER, L. J. I am of opinion that this appeal should be dismissed.

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By the terms of the bill of lading, the consignee is only to receive his goods on the payment of freight for them and on the fulfilment of all other conditions as per charter-party. Among those conditions is that by which the shipowner stipulates for payment of demurrage at a fixed rate, in the event of the vessel carrying the goods being detained beyond the working days allowed by the charter-party. The language used, if construed according to its natural meaning, imports a liability on the part of the consignee for demurrage, co-extensive with the liability of the charterer, and the Court ought not to depart from what is the natural meaning of words selected by the parties to the contract, unless compelled by strong reasons or distinct authority. In *Wegener v. Smith*, 15 C. B. 285; 24 L. J. C. P. 25, the words of the bill of lading were substantially the same as here, namely, "against payment of the agreed freight and other conditions as per charter-party," and the construction put upon them was that to which I have referred. It is true, as was pointed out by the later case of *Smith v. Sieveking*, 4 E. & B. 945; 24 L. J. Q. B. 257, that there the demurrage sued for had arisen from the default of the defendant, but this fact was not even alluded to in the judgments of the learned Judges who decided the case, and clearly was not the ground of the decision. In *Gray v. Carr*, L. R., 6 Q. B. 522, the words were "he or they paying freight and all other conditions or demurrage (if any should be incurred), for the said goods *as per the aforesaid charter-party," and [*537] although the Court of Exchequer Chamber decided against the shipowner, on the ground that the claim set up by him for damages for short loading was not provided for under the term "dead freight" used in the charter-party, so that the case is not a direct authority upon the point under consideration, yet, inasmuch as the majority of the Court, consisting of four out of six Judges, were of opinion that under the words "all the conditions as per the aforesaid charter-party," the holder of the bill of lading would have been liable for dead freight if any had been payable, the case, at least, indirectly confirms the authority of *Wegener v. Smith*. The cases of *Chappel v. Comfort*, 10 C. B. (N. S.) 802; 31 L. J. C. P. 58; *Fry v. Chartered Mercantile Bank of India*, L. R., 1 C. P. 689, and *Smith v. Sieveking*, 4 E. & B. 945; 24 L. J. Q. B. 257; 5 E. & B. 589, which have been cited on behalf of the defendant in the present case, so far from weakening the

authority of *Wegener v. Smith*, appear to me to tend still further to strengthen it. In each of them the reference to the charter-party contained in the bill of lading was either expressly, by the use of the words "freight as per charter-party," as in the two first cases, or impliedly by the use of the words "paying for the said goods as per charter-party," as in the last case, limited to the condition in the charter-party relating to freight, and was held to be made simply for the purpose of ascertaining the rate of freight, and not for the purpose of imposing an obligation upon the holder of the bill of lading to perform the conditions of the charter-party generally. In none of these cases was any doubt thrown upon the correctness of the decision in *Wegener v. Smith*. While in *Smith v. Sivecking* it is expressly approved of, and the Court, in referring to the language of the bill of lading, says: "This plainly indicated to the consignee that before he was entitled to the delivery of the goods he was bound to make a payment beyond the freight; and there was a reference to the charter-party for some condition to be performed beyond the payment of freight." That condition was payment of demurrage, and the bill of lading was construed as if it had expressly made the payment of demurrage a condition on the performance of which [*538] the goods were deliverable. The consignee *accepting the goods under such a bill of lading could not escape the payment of demurrage by denying his liability to pay it. The true result of the authorities therefore is, that a bill of lading in which the words "and all other conditions as per charter-party," follow the expression "on paying freight," or "paying for the said goods," or similar expressions, imports a liability on the part of the consignee of goods under the bill of lading to pay the demurrage stipulated for by the terms of the charter-party to which it refers.

It is said, however, on the part of the defendants, that the present case is distinguishable from those of *Wegener v. Smith* and *Gray v. Carr*, by the fact that in them the bill of lading comprised the whole cargo, while here it comprises only a portion of the cargo; but with the exception of an observation of MAULE, J., made in the course of the argument in the former case, I can find nothing which would justify me in supposing that such a distinction exercised any material effect upon the decisions in those cases, and the absence of any reference in the judgments to it is an argument against its existence. For myself I feel a difficulty in see-

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ing how the construction of a bill of lading, which on its face may not, and in many cases will not, prove the fact, whether the goods to which it refers do or do not constitute the whole cargo of a chartered ship, can upon a point like that under consideration alter, according to whether the parol evidence establishes that fact in the affirmative or negative. One view by which it was suggested that this difficulty is met, is that the construction is not altered, but the conditions of the charter-party are to be read into the bill of lading, not absolutely, but with reference to the goods which are the subject of it, and that just as the freight, if regulated by the charter-party freight, is proportionate to the goods carried under the bill of lading, so the demurrage is to be divided among the consignees in proportion to the value of their goods. But this view by attempting to remove one difficulty raises another, for it would, if adopted, be impossible of being worked out, as a matter of commercial practice. It is impossible to suppose that a shipowner whose ship has been detained beyond the lay-days could in practice assert liens, or bring actions against all the bill of lading holders, for proportionate amounts of demurrage ascertained by a sort of *average statement; [*539] and the result would therefore be that a clause in the bill of lading, which would appear to have been inserted for the very purpose of securing the liens to which the shipowner is entitled by the charter-party, would become practically inoperative. Another view presented is that the working days under the charter-party must be allotted among the consignees of the cargo, in proportion to the amount of the cargo to be respectively received by them, so that if in the present case there had been seven consignees of the cargo in equal portions, then there being seven working days left for unloading at the port of discharge, each consignee would be entitled to one day for unloading, and would only be liable for demurrage if he exceeded, and to the extent that he exceeded, that one day. But this view is as unpractical as the other to which I have just referred, and would, if adopted, lead to the same consequence. There is in reality no practicable middle course between the right of the shipowner to treat each consignee as liable *in solido* for the demurrage secured by the charter-party, and the right of the bill of lading holder to have his goods entirely freed from the condition as to demurrage contained in the charter-party. And even if a middle course were

practicable, the parties to the bill of lading contract could only be held to have adopted it by giving a strained interpretation to the words used by them. But then it has been urged upon us that the inconvenience and hardship, which would arise if the consignee of a small parcel of goods were held liable for the whole demurrage under the charter-party, afford a strong practical argument against the construction of the bill of lading contended for by the plaintiffs. This might be so if it were possible to construe the bill of lading so as to exclude altogether the condition as to demurrage, but if that condition must be included, as for the reasons I have already given I think it must, and the words by which it is included in their natural meaning import, as I also think they do, that the condition is to be read as if it was introduced into the bill of lading, while any other construction of the bill of lading would lead to an utterly impracticable result, the argument founded upon the alleged inconvenience and hardship to the consignee becomes of little force. It is no doubt a startling

consequence if by the construction which this Court puts [* 540] upon the bill of lading—as it has been suggested, *and as I understand BRETT, L. J., holds—the shipowner can recover the demurrage against all as well as against any one or more of the consignees, so that he may be paid over and over again. If the words of the charter-party are to be read in to the bill of lading in such a manner as that reference to the charter-party and to what is done under the charter-party, except for the purpose of reading the words in, cannot be made, such a consequence would follow; but in that case, *Leer v. Yates*, 3 Taunt. 387 (*ante* p. 219), becomes an authority that, notwithstanding that consequence, the consignee is liable for the entire demurrage, and *Leer v. Yates*, notwithstanding the dissent from the doctrine laid down in it expressed by Lord TENTERDEN in the cases of *Rogers v. Hunter*, Moo. & M. 63, and *Dobson v. Droop*, Moo. & M. 441, still stands as an authority.

But, on the other hand, without taking upon myself to express an opinion upon a point which is not directly before us, especially in the face of the opinion of BRETT, L. J., I must at least say that I do not think it altogether clear that when a bill of lading stipulates that a consignee under it is to have his goods on payment of freight and on the performance of all other conditions of the charter-party: and, in point of fact, all demurrage due under the

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charter-party has been paid to the shipowner by some other consignee under a similar bill of lading, so that the condition in the charter-party as to demurrage has been performed, although not by the particular consignee; that fact would not constitute in equity, if not at law, a defence to an action for demurrage brought against the first consignee. Be this how it may, I feel bound by the language of the contract between the parties in this case to hold that the plaintiffs were entitled to recover against the defendants the demurrage claimed, and that consequently the decision in their favour by the learned Judge in the Court below was right and should be affirmed.

COTTON, L. J. I agree in the decision, and also in the reasons which have been given by THESIGER, L. J., for the conclusion at which he has arrived. The question is, what is the contract the parties have entered into by the bill of lading? The words of *the bill of lading are "paying freight for the [*541] same goods and all other conditions as per charter-party." There is an express provision in the charter-party that the shipowner shall have an absolute lien on the cargo for all freight, dead freight, and demurrage. It is impossible not to import that into the contract entered into by the bill of lading. We are not at liberty to reject the words "all other conditions," unless there is something manifestly inconsistent in introducing them. The lien is on the cargo and on every part of it; and although the bill of lading refers to one part of the cargo, yet my opinion, as a matter of construction of the contract between the parties, is, that this condition shall be introduced, and being introduced, there is a lien on every part of the cargo for demurrage; and therefore, on the construction of the contract, the plaintiff is right. If parties choose to make these contracts they must take the consequences, and not come to the Court to enforce an unnatural construction of words simply for the purpose of avoiding an inconvenience which possibly they may not have conceived, but which is the result of a fair construction of the contract into which they have entered. As regards the question whether the plaintiffs could recover from each holder of a bill of lading the full amount of the demurrage, the question does not arise before us, therefore I think it better not to express any opinion upon it. I think that the plaintiff has, under his contract with the defendant, a right to recover the sum sued for.

BRETT, L. J. I do not differ from the decision at which the LORD JUSTICES have arrived, for to decide otherwise would be to break many settled rules of law. The bill of lading is, "on paying freight for the same goods and all other conditions, as per charter-party." I endeavoured in *Gray v. Carr*, L. R., 6 Q. B. at p. 533, to give what I thought was a reasonable interpretation to those words, "and all other conditions as per charter-party;" but my interpretation was not accepted by the majority of the Court. I take the decision in *Gray v. Carr* to have been that those words in a bill of lading are to be treated as words of reference to the charter-party, and that they therefore introduce into the [*542] bill *of lading every condition that is in the charter-party by way of reference; so that they bring into the bill of lading every condition of the charter-party in its terms, and make every one of those conditions part of the bill of lading, as if they had been originally written into it. But then there is another rule which applies, which is, that if taking all the conditions to be in the bill of lading, some of them are entirely and absolutely insensible and inapplicable, they must be struck out as insensible; not because they are not introduced, but because being introduced they are impossible of application. The bill of lading must therefore be considered as if all the conditions of the charter-party had been absolutely written into it originally, and then we have a bill of lading in this form: fourteen working days for loading and unloading, and ten days on demurrage. It is impossible to say that condition is not applicable to a bill of lading, although the bill of lading represents only part of the cargo. It is applicable, although it seems to me strange that a person should enter into such a contract. Then there is another rule. The bill of lading claims to be a contract between the shipowner and the person taking the bill of lading. There is no relation whatever between the holders or takers of other bills of lading and any one holder of a bill of lading. They are not co-sureties. When, therefore, it is said we can look at all the bills of lading and then divide the days of demurrage or the lay-days between them, we are looking at other bills of lading which cannot be given in evidence. They cannot be received in evidence in an action between the shipowner and the holder of a bill of lading, and therefore when it is said that the bill of lading represents a part of the cargo, and that the other bills of lading are in the same form, we break the rule

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which does not allow us to look at them, for we do not know whether the other bills of lading are in the same form. Then what is the contract represented by the bill of lading with the conditions in it? It seems to me that the cases of *Randall v. Lynch*, 2 Camp. 352 (11 R. R. 727), and *Leer v. Yates* (p. 219, *ante*), 3 Taunt. 387, and particularly the case of *Thiis v. Byers* (p. 225, *ante*), 1 Q. B. D. 244, show what the contract is, when that contract is in this form. It is not that the holder of the bill of lading will discharge his cargo * within a reason- [* 543] able time after he is able to do so; it is that if the ship is not able to discharge the whole of her cargo within the given number of days after she is at the usual place of discharge, the holder of that bill of lading will pay a certain sum for each day beyond those days, however the delay may be caused, unless it is by default of the shipowner. That is stated to be so in *Thiis v. Byers*. Therefore the holder of a particular bill of lading is bound to pay according to that contract for every day beyond the stipulated days, during which the ship remains with the cargo in her, unless the delay is caused by the fault of the shipowner.

Now in this case there is no fault on the part of the shipowner; the delay might be caused by accidents over which none of the holders of the bills of lading had any control, or it may have been caused by delay of the holders of cargo above that of the defendant. But even supposing it is by their neglect, in the contract between the shipowner and the defendant there is no stipulation about the negligence of other people. The defendant is to pay, unless it is the fault of the shipowner. The negligence of the owners of the cargo above is not the fault of the shipowner. Therefore the negligence of owners of cargo above would be one of those negligences the consequence of which the defendant has undertaken to pay for. Therefore whether they were negligent or not, it seems to me on his contract he must pay. If I could arrive at an opposite conclusion I would, for I do not share the doubt of THESIGER, L. J. I think that if the consignee of a portion of the cargo had a bill of lading in the same words, and had been called upon to pay, and had paid the whole demurrage to the shipowner, the holder of another bill of lading, if sued, could not set that up as a defence. That defence would arise in respect of a wholly independent contract between the shipowner and the holder of the other bill of lading. He could not set it up as a defence, because

he would have no right to prove that other and wholly independent contract. I accept the proposition that it would be no defence for the owner of the bill of lading, to say that the shipowner had been paid the same sum by all other holders of bills of lading for cargo in the ship. Therefore I think that we are bound to follow the decision of *Leer v. Yates*. I cannot do so without [* 544] considerable * hesitation, after the expressions of opinion of eminent Judges, of the authority of Lord TENTERDEN and Sir James MANSFIELD. We have to decide on a conflict of cases, and I prefer the decision of *Leer v. Yates* to the rulings laid down in *Rogers v. Hunter* and *Dobson v. Droop*.

There is another solution of the problem, which has been ingeniously suggested by Mr. Maclellan in the last edition of his book, at p. 496, where he suggests that there are two elements which enter into this question, namely, time and amount, and he proposes a solution somewhat between the opinion of Sir James MANSFIELD and Lord TENTERDEN; but his solution would break the settled rules of law, and cannot be admitted.

It has suggested itself to me that, if the holder of the bill of lading of cargo above were to delay the ship unreasonably, it is possible that the holder of the bill of lading of cargo under him might have an action against him for damages. It may be they owe the duty to each other, that no one of them shall negligently delay; but there may be difficulties in bringing an action. He may not have notice of the contract, or there may be other difficulties, still I think it is possible he may have that remedy — it is reasonable — but he certainly can have no other; he cannot maintain an action against the others for contribution; and it does not seem to me that there is any equity between them. So that I accept the whole consequence that was seen by Sir James MANSFIELD in *Leer v. Yates*; but at the same time I think the rules of law oblige me to say that the holder of each bill of lading is liable if the ship is delayed beyond the number of days allowed in his bill of lading. The judgment of LUSH, J., is correct, and must be affirmed.

Judgment affirmed.

ENGLISH NOTES.

In *Wegener v. Smith* (1854), 15 C. B. 285, 24 L. J. C. P. 25, the bill of lading which comprised the whole cargo stipulated that the cargo was to be delivered "against payment of the agreed freight and

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other conditions as per charter-party; " and it was held that under this contract the assignee of the bill of lading might be liable for demurrage, if he received the goods.

In *Gray v. Carr* (1871), No. 2 of "Dead Freight," 8 R. C. 479 (L. R., 6 Q. B. 522, 40 L. J. Q. B. 257, 25 L. T. 215, 19 W. R. 1173), the charter-party gave the owners an absolute lien on the cargo for demurrage. The loading having been completed after considerable delay, bills of lading were signed which stipulated that the consignees were to receive the cargo, "paying freight and all other conditions or demurrage (if any should be incurred) for the said goods as per the aforesaid charter-party." It was held by a majority of the Court of Exchequer Chamber that the lien was retained by the terms of the bill of lading. The comments upon these cases by the judges who decided the ruling case should here be referred to.

But where the consignees, before the arrival of the vessel at the port of discharge, refused to pay demurrage incurred at the port of loading, but paid the freight and took delivery of part of the cargo, the owners exercising their lien for demurrage over the residue, it was held that the consignees were not liable, notwithstanding that the bill of lading contained the clause "all other conditions as per charter-party." *Steamship "County of Lancaster" v. Sharpe* (1889), 24 Q. B. D. 158, 59 L. J. Q. B. 22, 61 L. T. 692.

It would seem, however, that if the bill of lading contains no reference to the stipulation for demurrage in the charter-party, the consignee will not be liable. Thus in *Smith v. Siveeking* (1855), 5 El. & Bl. 589, affirming 24 L. J. Q. B. 257, it was held that a consignee entitled to goods under a bill of lading, on "paying for the said goods as per charter-party," did not by taking the goods at the destination make himself liable to pay for demurrage at the port of loading for which a lien was given by the charter-party.

In *Young v. Moeller* (1855), 5 El. & Bl. 755, 25 L. J. Q. B. 94 (reversing 5 El. & Bl. 7, 24 L. J. Q. B. 217), the charter-party provided for delivery of the cargo on payment of freight and for demurrage if the ship were detained beyond the lay-days. The bill of lading stipulated for delivery to the consignees "on paying freight for the said goods as per charter-party." The owner delivered a portion of the goods and demanded payment of freight in respect thereof, and the consignees refusing to pay, the lay-days expired before the residue was delivered and the freight paid. It was held that there was no evidence of any agreement by the consignees to take the cargo in a reasonable time.

And where the bill of lading made the goods deliverable to the consignee on his paying freight according to the charter-party, and in the margin thereof were the words "there are eight working days for

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unloading in London," it was held that the consignee was not liable in an action for demurrage for detention at the port of discharge beyond the time allowed by the charter-party, as there was no intention apparent on the bill of lading that the person receiving the goods thereunder was to pay demurrage. *Chappel v. Comfort* (1861), 10 C. B. (N. S.) 802, 31 L. J. C. P. 58, 4 L. T. 448, 9 W. R. 694.

In *Christoffersen v. Hansen* (1872), L. R., 7 Q. B. 509, 41 L. J. Q. B. 217, 26 L. T. 547, 20 W. R. 626, in a charter-party by which it was agreed that the defendant should load the plaintiff's ship, it was provided that, the charter-party being concluded by the defendant on behalf of another party resident abroad, "all liability by the defendant should cease as soon as he had shipped the cargo." In an action upon the charter-party for delay in loading, the defendant pleaded that before action brought he had shipped the cargo, and that therefore his liability had ceased under the charter-party. It was held that, on a true construction of the charter-party, it only meant that the defendant should be exonerated from liability for anything that occurred after shipment, and that he was not exonerated for breaches occurring before the completion of the shipment although not sued for until afterwards.

In giving judgment in the last mentioned case, BLACKBURN, J. and LUSH, J. relied upon the circumstance that no lien was given for demurrage or delay in loading; LUSH, J., observing, — "If there had been any provision in the charter-party giving the shipowners a lien for damages caused by that delay in putting the cargo on board, there would be some reason why the defendant should be absolved from all liability. But there is no such lien in law, and the charter-party does not confer it." On this ground the case was distinguished in *Francesco v. Massey* (1873), L. R., 8 Ex. 101, 42 L. J. Ex. 75, 21 W. R. 440, where the clause was: "Charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage;" and the Court held the charterer protected from an action brought after completion of the loading. A similar decision is given, and the authority of *Francesco v. Massey* confirmed, by the Exchequer Chamber in *Kish v. Cory* (1875), L. R., 10 Q. B. 553, 44 L. J. Q. B. 205, 32 L. T. 670, 23 W. R. 880.

In *Lockhart v. Falk* (1875), L. R., 10 Ex. 132, 41 L. J. Ex. 105, 33 L. T. 96, 23 W. R. 753, the ship was to load "in the customary manner." She was to discharge in ten working days. "Demurrage at £2 per 100 tons register per day. . . . The ship to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in the charter ceasing when he has delivered the cargo alongside ship." It was held that the demurrage and the lien and exception clauses did not apply to damages for undue detention of the vessel at the port of lading.

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In *French v. Gerber* (1876), 1 C. P. D. 737, 45 L. J. C. P. 880, (affirmed 2 C. P. D. 247, 46 L. J. C. P. 320, 36 L. T. 350, 25 W. R. 355), it was agreed by the charter-party "that the liability of the charterers (who were principals) should cease as soon as the cargo was on board, provided the same was worth the freight at the port of discharge, but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage." The breaches sued for occurred after the cargo was on board. BRETT, J., summed up the result of the cases as follows: "The rule seems to be that where the words of the absolving part of the clause plainly show that all liability is to cease on loading, it is so to cease both as to antecedent and future liabilities and without regard to any lien: but where the words of the absolving part are open to either interpretation, then, without regard to lien, liability as to future transactions is not to accrue, but liability as to antecedent breaches is to cease only so far as an equivalent lien is given. It follows that in the present case the defendants are absolved by the clause in respect of all the damages sued for, whether a lien be or be not given as to part of them."

A case very similar to *Lockhart v. Falk*, *supra*, came to be decided in the Court of Appeal in *Dunlop v. Balfour* (1892), 1892, 1 Q. B. 507, 61 L. J. Q. B. 354, 66 L. T. 455, 40 W. R. 371. By the charter-party, it was stipulated that the ship should proceed to a loading berth at the port of loading, and there receive on board a full cargo, and being loaded should proceed to the port of discharge. "All liability of charterer to cease on completion of loading, provided the value of the cargo is sufficient to satisfy the lien which is hereby given for all freight, dead freight, demurrage, and average (if any), under the charter-party. . . To be loaded as customary . . . and to be discharged as customary at the average rate of not less than 100 tons per working day from the time the ship is in berth and ready to be discharged, and notice thereof has been given by the master in writing. Demurrage to be at the rate of £20 per day." The action was brought by the ship-owners against the charterers for undue detention at the port of loading. The Court of Appeal, approving of the decision in *Lockhart v. Falk*, held that the claim for undue detention at the port of loading was not "demurrage" within the meaning of the clause giving a lien, and — the principle being that the two clauses are to be read if possible as co-extensive — that the clause of cesser of liability did not apply to such a claim.

The question as to what conditions of a charter-party are incorporated by reference in a bill of lading was considered in *Serrano v. Campbell* (C. A. 1890), 1891, 1 Q. B. 283, 60 L. J. Q. B. 303, 64 L. T. 615, 39 W. R. 356. The bill of lading, after enumerating the exceptions,

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stipulated for delivery "to order or to assigns, they paying freight, . . . and all other conditions as per charter." The charter-party contained exceptions beyond those contained in the bill of lading, including an exception of stranding even when occasioned by the negligence of the master. The action was by an indorsee of the bill of lading who was a stranger to the charter-party, and the question was, whether he was affected by the exception. It was held that he was not. The Court construed the words "all other conditions as per charter," as meaning "all those conditions of the charter-party which are to be performed by the consignees of the goods," and did not incorporate a condition extending the exceptions to the liability of the shipowner beyond those contained in the bill of lading.

AMERICAN NOTES.

The principal case is cited in Porter on Bills of Lading, sect. 74.

The phrase "freight and charges" does not include demurrage. *Huntley v. Dows*, 55 Barbour (New York), 310.

It has been held in the State courts that demurrage is not recoverable from the consignee unless the bill of lading stipulates for its payment. *Gage v. Morse*, 12 Allen (Mass.), 410; *Miner v. N. & W. R. Co.*, 32 Connecticut, 91.

But otherwise in the Federal Courts. *Sprague v. West*, Abbott Admiralty, 548; *Railroad Company v. Northam*, 2 Benedict (U. S. Dist. Ct.), 1; *Pietro G.*, 38 Federal Reporter, 148; *The Hyperion's Cargo*, 2 Lowell (U. S. Circ. Ct.), 93; *Hargood v. Tons of Coal*, 21 Federal Reporter, 681.

The phrase in the bill of lading, "paying for said goods as per charter-party," does not impose demurrage on the consignee. *Sticks of Timber*, 8 Benedict (U. S. Dist. Ct.), 211; *Grown v. Woodruff*, 19 Federal Reporter, 143.

DEPOSIT.

GIBLIN v. M'MULLEN.

(P. C., APP. FROM VICTORIA, 1869.)

RULE.

A PERSON receiving property by way of deposit for safe custody gratuitously, is not responsible for any higher degree of care than a reasonable and prudent man may be expected to take of property of the like description.

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38 L. J. P. C. 25; L. R., 2 P. C. 318 (s. c. 21 L. T. 214; 17 W. R. 445).

Bailment. — Banker. — Gratuitous Deposit.

This case is fully set forth as No. 3 of "Banker," 3 R. C. 613.

ENGLISH NOTES.

The liability of bankers in respect of articles received by way of gratuitous deposit, is fully discussed in the principal case under the title "Banker" and Notes, 3 R. C. 613 *et seq.* Cases relating to the liability of the depositee are not numerous.

In *Clarke v. Earnshaw* (1818), Gow. 30, 21 R. R. 790, it was ruled by DALLAS, C. J., at *visi prius* that a chronometer maker receiving a chronometer to be repaired was bound to keep it secure against depredations from persons within the house. It was further observed, as a reason for inferring negligence, that the defendant had taken care of his own property by locking up and securing it. The plaintiff had a verdict. This was not a case of gratuitous deposit, but of bailment for hire of goods to have work done on them.

The case of *Doorman v. Jenkins* (1834), 2 Ad. & El. 256, referred to in the principal case (3 R. C. 622), was one in which the evidence of negligence was very meagre, but in the result the Court did not disturb a verdict for the plaintiff. The facts were that the defendant, a coffee-house keeper, having custody of money without reward, lost it under circumstances which he had explained by the following statement: "That he had placed the money with a larger sum of his own, into his cash-box, which was kept in his tap-room; that the tap-room had a bar in it, and was open on a Sunday, but the rest of his house, which was inhabited, was not open on a Sunday; and that the cash-box, with his own and the plaintiff's money, had been stolen that day." That the evidence was meagre was perhaps the necessary result of a system which excluded the parties from giving their own direct evidence upon the points at issue. TAUNTON, J., observed: "We might certainly have had more explicit evidence as to the exact state of the bar; in what place it was; and what class of strangers frequented the room. If there was no negligence, if the box was locked up and put in a safe place, and proper care taken of it, these were circumstances which the defendant had the best means of knowing, and knowing them he might have exonerated himself. In the absence, therefore, of evidence to that effect, I think that there was a *prima facie* case of gross negligence, which required an answer on the defendant's part." All the

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decision comes to is that the jury were entitled to read between the lines of the defendant's explanation, and to infer that he acted with an unjustifiable degree of carelessness. As to the phrase "gross negligence," see the observations of WILLES, J., in *Oppenheim v. White Lion Hotel Co.* (1871), L. R., 6 C. P. at p. 521, 40 L. J. C. P. at p. 232; and *Coshell v. Wright* (1856), 6 Ell. & Bl. 891, 899.

The cases as to innkeepers will be further considered under that title.

As to the liability of railway companies for personal luggage deposited on their platforms pending the departure of a train, see *Great Western Railway Co. v. Bunch*, No. 15 of "Carrier," 5 R. C. 471; and *Locell v. London, Chatham and Dover Railway Co.*, and other cases referred to in notes, 5 R. C. 499 *et seq.*

AMERICAN NOTES.

The principal case is cited in Schouler in his recent work on Bailments, and the Rule states the doctrine uniformly recognized in this country. The present writer, in a very recent work on Bailments, states the law thus: "As the bailee receives no compensation, the degree of care exacted from him is in proportion; he is liable only in case of fraud or gross neglect." Citing *Turrentine v. W. & W. R. Co.*, 100 North Carolina, 375; 6 Am. St. Rep. 602. That was the case of a warehouse-man keeping goods gratuitously, and it was held that he was not bound, in case of imminent danger from fire to the warehouse where they were stored with other goods, to act on the suggestion of the owner as to the best means of saving them. "If an honest and reasonable effort is made, suggested at the time as the best line of action to be pursued, and this in good faith, and of this the peril to the defendant's property gives full assurance, it exonerates from liability for loss. The warehouse, built of brick and its roof slate-covered, seems to have been deemed wellnigh fire-proof; and even now, in reviewing the past, it is not clear that the plaintiff should have been permitted to take away his goods and thereby endanger, if not ensure the destruction of the other goods, and if it were otherwise, and that the servants of the company erred in their action, it could hardly be imputed as negligence in them to so act upon an honest, though it may turn out to be a mistaken, judgment." The same was held where a boarder requested the boarding-house keeper to deposit his money in his safe, and the safe was feloniously broken and the money stolen. *Jennings v. Reynolds*, 4 Kansas, 110. And so where a regular boarder at a hotel deposited money in the landlord's safe and it was stolen by the night clerk without negligence on the landlord's part. *Taylor v. Downey*, Michigan Supreme Court; 62 N. W. Rep. 716. And so where one received for gratuitous delivery a sealed letter containing money. *Beardslee v. Richardson*, 11 Wendell (New York), 25; 25 Am. Dec. 596 (with notes); followed in *Hagpie v. Waring*, 29 Alabama, 265; *Skelley v. Kahn*, 17 Illinois, 171; *Lampley v. Scott*, 21 Mississippi, 533; *Eddy v. Livingston*, 35 Missouri, 193. And where a railroad company retained freight on their cars for the owner's accommodation and without any ad-

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ditional compensation. *Knowles v. Atlantic, &c. R. Co.*, 38 Maine, 55; 61 Am. Dec. 234. And where one found a bank note and deposited it for gratuitous safe-keeping with defendant, from whose safe it was stolen. *Tancil v. Seaton*, 28 Grattan, 601; 26 Am. Rep. 380. To the same effect: *Edson v. Weston*, 7 Cowen, 278; *Sodowsky's Ex'or v. McFarland*, 3 Dana, 205; *Rozelle v. Rhodes*, 116 Pennsylvania State, 129; 2 Am. St. Rep. 591; *Hibernia Bldg Ass'n v. McGrath*, 154 Pennsylvania State, 296; 35 Am. St. Rep. 828; *Coal Co. v. Richter*, 31 West Virginia, 858; *Burk v. Dempster*, 34 Nebraska, 426; *Spooner v. Mattoon*, 40 Vermont, 300; 94 Am. Dec. 395; *Minor v. Chic., &c. Ry. Co.*, 19 Wisconsin, 40; 88 Am. Dec. 670; *Dunn v. Brauner*, 13 Louisiana Annual, 452; *Jourdan v. Reed*, 1 Clarke (Iowa), 135; *Bronnenburg v. Charman*, 80 Indiana, 475; *Davis v. Gay*, 111 Mass. 531.

It has sometimes been laid down that a bailee for safe-keeping without reward is bound only to such care of the deposit as he takes of his own property of a similar kind. Thus in one case it is said: "The degree of care which is necessary to avoid the imputation of bad faith is estimated by the carefulness which the depositary uses toward his own property of a similar kind. This is now the received law as to this kind of bailment, notwithstanding it is denied by Lord COKE in 1 Inst. 896. It is recognized in *Coggs v. Bernard*, 2 Ld. Raym. 909. And the same law as to gratuitous bailment is mentioned by Sir William Jones, and is sanctioned in *Foster v. Essex Bank*." *Lloyd v. West Branch Bank*, 15 Pennsylvania State, 172; 53 Am. Dec. 581. But it is believed that this statement is too broad. Something would depend on the character of the bailee and of the property. His customary gross negligence toward his own property would not justify it toward the deposit, as for example, if he was accustomed to keep his money in a stocking instead of a safe or a bank. And much would depend on the nature of the property. He must observe a reasonable degree of care, and in other cases, with reference to the nature of the goods and the particular circumstances of the bailment, the degree of care exacted is in proportion to the value of the property to be kept. *Conner v. Winton*, 8 Indiana, 315; 65 Am. Dec. 761. But it seems that if the bailor knows the general character and habits of the bailee, and the place where and the manner in which the goods are to be kept, he is conclusively presumed to assent that his goods shall be so treated, and cannot maintain an action for loss or injury. *Knowles v. Atlantic, &c. R. Co.*, 38 Maine, 55; 61 Am. Dec. 234.

Spooner v. Mattoon, *supra*, is an interesting case. A. and B. were soldiers in camp, occupying tents something like fifty yards apart. A. had \$775, and fearing it would not be safe with himself, had left it with B., his friend, without expectation of reward on B.'s part, for safe-keeping for two nights, and called for it on the following mornings. This was repeated on the third night, but A. did not call for the money on that morning. B. wanted to rid himself of the charge, and on the third morning, before going on duty, he started for A.'s tent, intending to return the pocket-book containing the money. Having no pocket large enough to hold it, and not wishing to expose it to view, he put it between his shirt and his waistcoat, intending to keep it secure by the pressure of his arm. On the way his attention was

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diverted, and the pocket-book slipped out and was lost. The inference of embezzlement being excluded, it was held that he was not grossly negligent.

On the other hand, in *Burk v. Dempster, supra*, the plaintiff having by permission left a stove in a building which he had sold, and the defendant having leased the building, and consented to the stove's remaining where it was, the defendant, afterward needing the room, put the stove out doors on the lot in rear of the building, exposed to the elements, whereby it was injured. Held, that the defendant was liable therefor, and the plaintiff recovered five dollars. "It was gross negligence to remove the stove to a vacant lot, and leave it there unprotected."

In *Davis v. Gay, supra*, the plaintiff, tenant of a suite of rooms in an apartment house, obtained leave from the defendant, the proprietor, to store some trunks in a general store-room provided for the tenants, informing him that he had a janitor who slept there, and he thought they would be safe. Afterward the janitor disappeared and the contents of the trunks with him. Held, that defendant was not guilty of gross negligence, and therefore not liable.

The bailee however may render himself liable for loss or injury if he uses the property, contrary to the implied agreement, or he may render himself liable as for a conversion. This principle however is limited to a use for the benefit of the bailee, and does not extend to a use for the benefit of the property, which indeed he is sometimes bound to make, as for example, to exercise a horse, or milk a cow. *Hartop v. Hoare*, 2 Strange, 1187; *De Foncleur v. Shottenkirk*, 3 Johns. (N. Y.) 170. And so if the use would not injure or endanger the property; for example, he may justifiably read a book so deposited. But if the use subjects the property to risk of loss or injury, like the wearing of jewels, he is liable for loss or injury therein. The use however must have that natural tendency in order to render him liable. So where S., a guest of N., deposited with him for safe-keeping government bonds of the value of \$1500, and N. with the consent of S. put them in a box with his own valuables, which he locked and placed in a drawer in a bureau in his bedroom, which drawer he also locked: and afterwards N., without the consent or knowledge of S., took one of the bonds and pledged it as security for his own debt; and thereafter a thief entered the house, broke both locks and stole the other bonds and N.'s papers, it was held that N. was not liable to S. for the bonds taken by the thief. *Schermer v. Neurath*, 51 Maryland, 491; 29 Am. Rep. 397; the conversion of the one not working a conversion of the others. So when plaintiff deposited with a merchant a sum of money for gratuitous safe-keeping, with permission to use it, of which he never availed himself, but his bookkeeper, with the acquiescence of both parties, occasionally took small amounts from it temporarily to make change, and the deposit was kept separate, and stolen without the defendant's fault, he was held not to be liable. *Caldwell v. Hall*, 60 Mississippi, 330; 45 Am. Rep. 410.

The bailee without reward is responsible for the gross negligence of his servants in keeping the deposit to the same degree as for his own, provided it is within the course or line of his employment, but if the servant steps out

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of his way to do a wrong, either fraudulently or feloniously, the master is not answerable. *Foster v. Essex Bank*, 16 Massachusetts, 245; 8 Am. Dec. 135. But a bailee without a lien is not liable for bailment of money taken out of his safe by a clerk whom he allowed to open the safe, *Glover v. Burbidge*, 27 South Carolina, 305; unless the master's gross negligence affords the opportunity.

If the bailee without reward specially agrees to keep safely, he is bound to a higher degree of care. It was early held that such an undertaking would render him liable for loss by robbery. But to render him thus liable there must be a distinct undertaking to keep safely. Mere loose talk, or the mere understanding of the bailor, would not effect it. *Foster v. Essex Bank*, *supra*, where it was held that the cashier's receipt "for safe-keeping" did not imply an agreement to keep safely. "It contains no promise, and assumes no risks other than would be derived from the mere delivery without any writing." It was also held that the weighing of the gold in presence of the president and cashier did not imply any special undertaking to keep safely.

 DESCENT.
No. 1. — **BIRTWHISTLE v. VARDILL**

(H. L. 1840.)

RULE.

IN order to inherit lands situate in England, a person must be legitimate according to the law of England.

A child born in Scotland of domiciled Scotch parents, who were not married at the time of his birth, but afterwards intermarried in Scotland (there being no lawful impediment to their marriage, either at the time of birth or afterwards), though legitimate by the law of Scotland, cannot succeed to lands in England as heir of his father.

Birtwhistle v. Vardill.

7 Cl. & Fin. 895; 9 Bl. (N. S.) 32, West, 500; 4 Jur. 1076.

This case is fully set forth as No. 5 of "Conflict of Laws," 5 R. C. 748 *et seq.* And see Notes thereto.

ENGLISH NOTES.

The reader is referred to the report of this case and the notes in 5 R. C. 748 *et seq.* The following cases, which are also reproduced in 5 R. C., and the notes to them, also deal with questions affecting legitimacy. *Brook v. Brook*; *Sottomayor v. De Barros*; *Sottomayor v. De Barros (Queen's Proctor intervening)*; *Hyde v. Hyde*, 5 R. C. 833; and *Brinkley v. Attorney General*; Conflict of Laws, Nos. 7-10; 5 R. C. 783-847.

The title of an alien to take property by descent was discussed in *Calvin's Case*, &c., 2 R. C. 575, and Notes, p. 645 *et seq.*

The rule of descent of an equitable estate in lands follows the legal rule. *Cowper v. Lord Cowper* (1734), 2 P. Wms. 736.

In former times there would have been no escheat of an equitable fee. The trustee was the person who would have been responsible for the performance of the feudal services. The right of the trustee to hold the land for his own benefit was taken away by the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71) s. 4. The subject of escheat was discussed in Nos. 1 & 2 of "Crown," 8 R. C. 150. And see "Escheat," *post*.

AMERICAN NOTES.

In *Long v. Hess*, 154 Illinois, 482; 27 Lawyers' Rep. Annotated, 791, it was held that an ante-nuptial contract made in a foreign country, by which children of a former marriage of the wife were adopted as heirs of the husband, will not prevent his disposition of real property subsequently acquired in Illinois after his emigration thither, although the children were infants at the time of the emigration, incapable of consenting to a change of domicile or waiving any rights, because if they acquire the status of heirs, their inheritance must be in accordance with the laws of Illinois, by which the husband has an absolute right to dispose of his property by will to the exclusion of natural or adopted children. The Court relied on Story on Conflict of Laws, sect. 113; *Fuss v. Fuss*, 24 Wisconsin, 256; 1 Am. Rep. 180; *Castro v. Illies*, 22 Texas, 479; 73 Am. Dec. 277; *Besse v. Pellochour*, 73 Illinois, 285; 24 Am. Rep. 242; *Lyon v. Knott*, 26 Mississippi, 518; *Kneeland v. Ensley*, Meigs (Tennessee), 620; 33 Am. Dec. 168; *Saul v. His Creditors*, 5 Martin (Louisiana), N. S. 569; 16 Am. Dec. 212; *Le Breton v. Miles*, 8 Paige (New York Chancery), 261; *Gale v. Davis' Heirs*, 4 Martin O. S. (Louisiana), 615; and distinguished *Decouche v. Saretier*, 3 Johnson Chancery (New York), 190; *Scherferling v. Huffman*, 4 Ohio State, 241; 62 Am. Dec. 281, on the ground that the matter was there covered by express stipulation in the contracts.

No. 2. — *Right d. Mitchell v. Sidebotham*, 2 Doug. 759. — Rule.

No. 2. — *RIGHT d. MITCHELL v. SIDEBOTHAM.*

(K. B. 1781.)

RULE.

AN heir can only be disinherited by the express words of a will, or by necessary implication of the intention to give the estate away from him. Where, therefore, a testator dies seized in fee of lands, but does not dispose of his entire interest therein, the heir will take whatever is not effectively devised, even in a case in which the testator has expressed a wish that the heir shall take nothing.

Right d. Mitchell v. Sidebotham.

2 Douglas 759-764.

Devise. — Partial Intestacy. — Heir.

By the following devise, viz. "I give and demise to A. her heirs and [759] assigns for ever, all lands at B., and I give and bequeath to A. aforesaid all my lands at C.," A. only takes an estate for life in the lands at C., and the reversion thereof shall descend, although the will begin with these introductory words, "For these worldly goods and estates wherewith it has pleased God to bless me," and contained a legacy of 1s. to the heir-at-law.

On an ejectment, tried at the last Spring Assizes for the County of Oxford, before HEATH, J., a special verdict was found, which stated: That one William Sparrowhawk, being seised in fee-simple of the premises in question, on the 10th of February, 1758, made and duly executed his will, and, thereby devised as follows: "For those worldly goods and estates wherewith it has pleased Almighty God to bless me, I give and dispose in manner following. *Imprimis*, I give and bequeath to my sister, Susannah Mitchell, one shilling. *Item*, I give and bequeath to John Mitchell, son of Susannah Mitchell, one shilling, to be paid by my executrix hereinafter named, within three months after my decease. *Item*, I give and bequeath to my loving wife, Susannah Sparrowhawk, all the rest of my goods and chattels, and personal estate whatsoever. Also, I do give and demise unto Susannah Sparrowhawk, my said wife, her heirs and assigns forever, all my lands lying in the parish of Bampton in the Bush, in the county

of Oxford, and now in the occupation of Mary Sparrowhawk of Aston, in the parish aforesaid. And I give and bequeath to my loving wife aforesaid, all my lands, tenements, and houses, lying in the parish of Chipping Norton (to wit) the house I now live in, the Sign of the Plough, standing between the houses of W. W. and T. A. and now in my occupation, with the yard, garden, and out-houses, and all other appurtenants thereto belonging. Lastly, I do make and constitute Susannah Sparrowhawk, my said wife, full and sole executrix of this my last will and testament." — That the testator died seised in fee, on the 20th of September, 1766, leaving the said Susannah Mitchell, one of the lessors of the plaintiff, his only sister and heir-at-law; and that the testator's widow married the defendant, Sidebotham, and died on the 1st of November, 1777.

The question upon this special verdict was, whether the last-mentioned premises in the will were, by the true construction thereof, devised to the widow in fee, or only for life?

Caldecott, for the plaintiff, insisted that only a life estate in those premises was given by the will, and that the reversion expectant on the death of the widow had descended to Susannah Mitchell, the testator's sister and heir-at-law. He [* 760] * said, it was clear, that, by the words of the devise, taken by themselves, nothing was given but an estate for life, and the Court would hold themselves bound by the legal operation of the words, and not indulge uncertain conjectures about the intent of the testator. The circumstances from which an intent to give an estate in fee might be attempted to be inferred, on the part of the defendants, were, first, the general introductory word at the beginning of the will, viz., "For those worldly goods and estates, &c.," and, secondly, the legacy of one shilling to the heir-at-law. The first, it might be said, indicated a determination to dispose of the complete interest in everything the testator had in the world,¹ and the other a resolution to disinherit his heir. But, as to the introductory words, they are almost, of course, in wills, and are merely descriptive and not meant to relate to the quantity of interest given in the things devised; and, as to the supposed disinheriting clause to the heir-at-law, it must be considered that the

¹ In *Maudy v. Maudy*, B. R. T. 8 worldly estate wherewith it hath pleased Geo. II. Lord HARDWICKE laid great stress God to bless me." Cas. Temp. Lord on similar words, viz., "In respect to my Hard., 142, 143, 2 Str. 1020, 1021.

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interest of the heir-at-law is, in no case, derived from the bounty of the testator, but from the disposition of law, and it is sufficient for his title, if the testator either does not give the whole to another person, or designing, perhaps, to do so, executes his design with so much uncertainty, and so insufficiently, as that it cannot be taken notice of by a Court of Law. The cases he relied upon were *Denn, Lessee of Gaskin v. Gaskin*, B. R. M. 18 Geo. III., Cowp. 657, and *Roe, Lessee of Callow & others v. Bolton*, C. B. M. 16 Geo. III. The first came on in the form of a special case, which stated, that John Gaskin, being seised in fee, by his will, after prefacing, "As to such worldly estate as it hath pleased God to endue me with," devised as follows: "I give and bequeath all that my freehold messuage and tenement lying in G. in the parish of D., together with all houses, farms, edifices, and appurtenants, reputed as part thereof, or belonging to the same, to Matthew Robinson, George Robinson, and Thomas Robinson, equally to them, my sister's sons." That the will then proceeded to give several pecuniary legacies, of different amounts, to different relations, and, among others, ten shillings to the lessor of the plaintiff; That the testator died seised in fee, and, afterwards, Matthew and George Robinson died; That Thomas Robinson was alive, and that the lessor of the plaintiff was the testator's [* 761] heir-at-law. The main question was, whether the three nephews took an estate in fee, or only for life; and it was argued, for the defendant, that they took an estate in fee, as must be collected from the prefatory words, and the legacy to the heir-at-law; but Lord MANSFIELD said, though he suspected the testator's intent was to give the whole interest, as he did not appear to have had any other lands, and had given a disinheriting legacy to his heir-at-law, the Court could not connect the prefatory with the devising clause; and, in the devising clause, there were not any words by which the Court would be warranted in construing it to be an entire disposition of the estate. WILLES, J., was absent; but ASTON and ASHHURST JJ., concurred, and ASTON, J., mentioned a case of *Right, Lessee of Shaw & another v. Russell*, in the Court of Exchequer, H. 1 Geo. III., where introductory words, like those in the present case, were held to be mere matter of form, and not material; and the day after he brought his note of that case into Court, and read it, and it appeared, that the will there began, "As touching the disposition of such temporal estate as it has pleased God to bestow

on me," and then the testator proceeded to give his house to his son, Samuel Russell, and after his death, then to the two sons of Samuel, Thomas and William, and then, at last, gave a legacy of one shilling to the husband of his heir-at-law; and the determination was, that Thomas and William only took for life, and that the reversion descended; and ASTON, J., observed, that that was a stronger case than *Denn v. Gaskin*, because, if Samuel had survived his two sons, they would have taken nothing by the will. In *Roe Lessee of Cullow & others v. Bolton*, there were these introductory words in the will; "As touching such worldly estate wherewith it hath pleased Almighty God to bless me with." The testator then gave all his real and personal estate to his wife for life, and then came this devise: "*Item*, I give unto my son, Taul Cardale, all that my land lying and being in the parish of Dudley, in the county of Worcester, near unto a certain place called Tinsly Hill, into three parts divided, at or immediately after my wife's decease." Then came several legacies of personal and [*762] leasehold property to his son, Isaac Cardale, and his daughter, Elizabeth Mason, after his wife's death, and then followed this clause: "*Item*, my will is that all my grandchildren that are living twelve months after my wife's decease shall have five shillings each of them as a token of the love that I bear unto my generation." The lessors of the plaintiff were the testator's heirs-at-law, being his granddaughters by his eldest son, William Cardale, and the question being, whether Paul Cardale took an estate for life or in fee, the Court held, that he only took an estate for life; yet in that case, likewise, there was the same sort of introductory clause as here, and also a disinheriting legacy. After stating the two foregoing cases, Caldecott observed, that it appeared, that the testator knew the technical words necessary to create a fee, having used them in the first branch of the devise, and, therefore, he must be considered as having designedly omitted them in the other; nay, that the very circumstance of making two branches of the devise showed a design to give different interests, since, if he had meant to give the same estate in all the premises, one set of words would have answered the purpose. He also cited the cases of *Swayne v. Fawkner & another*, *Executor of Middleton*, Dom. Proc. Show. Parl. Cas. 207; Skinn. 339; and *Beristow v. Hussey*, B. R. M. 6 W. & M., Skinn. 385, 562.

Bower, for the defendants, contended, that the intention was

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clearly to give the whole interest. The testator not only begins by expressing the purpose of disposing of all his property, but uses the double precaution of giving legacies both to his heir-at-law and her son. In the case of *Cole v. Rawlinson*, B. R. H. 1 Ann., 1 Salk. 234, 2 Ld. Raym. 831, words sufficient to carry a fee-simple in the first part of a devise were connected with a subsequent part, so as to make that an estate in fee, which would otherwise only have been for life, by the opinion, — POWELL, POWYS, and GOULD, Justices, against Lord HOLT. The words were, "I give, ratify, and confirm all my estate, right, title, and interest which I now have, and all the term and terms of years which I now have, or may have in my power to dis- [* 763] pose of after my death, in whatever I hold by lease from Sir John Freeman, and also the house called the Bell Tavern, to John Billingsly." The copulative word "and" in that case was held sufficient to carry the preceding words, "all my estate, right, title, and interest," over to that part of the devise which respected the house called the Bell Tavern. In this present case there are, in like manner, words expressive of a fee-simple interest in the first branch of the devise, and that branch is connected with the other by the same copulative "and." That material circumstance was wanting in the case of *Dean v. Gaskin*. In short, if the interposing words in the second branch of the devise in question, between the copulative and the description of the premises thereby devised, viz., "I give and bequeath, &c.," were wanting, there could be no doubt. It would then be an express devise in fee: and the unnecessary use of these words cannot have the effect of defeating the clear intent of the testator. As to *Roe v. Bolton*, the reasoning of the Court, as stated by Mr. Justice BLACKSTONE, is rather in favour of the present defendants, for they clearly thought, that a legacy to an heir-at-law indicating an unequivocal intent to disinherit him, would be sufficient to give to words like those in the present case the effect of carrying a fee-simple. No serious argument can be drawn from any supposed knowledge this testator had of the technical operation of words, since, in the first branch of the clause in question, he uses the expression "demise," instead of "devise."

Lord MANSFIELD. I verily believe that, in almost every case, where by law a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted: for ordinary people

do not distinguish between real and personal property. The rule of law, however, is established and certain, that express words of limitation, or words tantamount, are necessary to pass an estate of inheritance. "All my estate" or "all my interest" will do; but "all my lands lying in such a place" is not sufficient. Such words are considered as merely descriptive of the local situation, and only carry an estate for life. Nor are words tending to disinherit the heir-at-law sufficient to prevent his taking, unless the estate is given to somebody else. I have no doubt but the testator's intention here was to disinherit his heir-at-law, as well as in the case of *Denn v. Gaskin*; but the only circumstance of difference

between that case and this, and which has been relied [*764] on as in favour of the defendants, if the testator had any meaning by it (which I do not believe he had), rather turns the other way, because he uses different words in devising two different parts of his estate. I think we are bound by the case of *Denn v. Gaskin*, and the other cited in that case by Mr. Justice ASTON.

WILLES, J. In *Cole v. Rawlinson* (which, however, was decided against the opinion of Lord HOLT), the whole devise was in one sentence; it was all one devise.

BULLER, J. It is impossible for us to make this only one devise, when the testator has made it two.

Judgment for the plaintiff.

ENGLISH NOTES.

The principle of this case was recognised and applied in *Thomas v. Thomas* (1796), 6 T. R., 671, 3 R. R. 306, and *Doe d. Tyrell v. Lifford* (1816), 4 M. & S. 550, 16 R. R. 537. Where lands are conveyed to uses, and the uses declared do not exhaust the estate of the conveying party, his heir will take whatever is not effectively disposed of. *Moore v. Magroth* (1774), 1 Cowp. 9.

That the heir will take all the estate in lands which is not otherwise disposed of is still good law. The Wills Act 1837 (1 Vict. c. 26), sections 21, 27 & 28, has however considerably enlarged the construction of devises so as to tell against the heir. There are many old cases in which the construction of general words, which would be capable of including real estate, has been strained by association with other words more particularly applicable to personal estate so as to preclude the intention of disinheriting the heir. But the tendency of modern decisions is against any such view, and the rule is to give all general

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expressions their fair scope whether they tend to give away the real estate to the prejudice of the heir or not. See *Atree v. Atree* (1871), L. R., 11 Eq. 280; *Smyth v. Smyth* (1878), 8 Ch. D. 561; *Hall v. Hall* (1891), 1891, 3 Ch. 389, 60 L. J. Ch. 802, 40 W. R. 138. As earlier cases in the same direction see *Doe d. Pratt v. Pratt* (1837), 6 Ad. & El. 180; *Saumarez v. Saumarez* (1839), 4 My. & Cr. 831.

By the Conveyancing and Law of Property Act 1881 (44 & 45 Vict. c. 41) s. 30, trust and mortgage estates now devolve on the personal representatives, and not on the heir.

The heir has no equity against the personal representative to have property which was converted by the order of the Court having jurisdiction in lunacy, reconverted for his benefit. *Oxenden v. Lord Compton* (1793), 2 Ves. Jr. 69, 2 R. R. 131.

AMERICAN NOTES.

The old English rule that by a devise of land to A. simply, without words of limitation, only an estate for life would pass, was formerly recognized in this country. *Wright v. Denn*, 10 Wheaton (U. S. Supr. Ct.), 238; *Van Alstyne v. Spraker*, 13 Wendell, 582; *Lummas v. Mitchell*, 34 New Hampshire, 45; *King v. Ackerman*, 2 Black (U. S. Sup. Ct.), 408; *Baker v. Bridge*, 12 Pickering (Mass.), 27. It was recognized in these cases that before the modern statutes, words of perpetuity must be used in a devise to carry the fee. In *Wright v. Denn*, *supra*, Mr. Justice STORY laid this down, citing *Loveacres v. Blight*, Cowp. 352, and *Goodright v. Baron*, 11 East, 220. The same was clearly enunciated in New York, before the statutory change in 1830. *Harvey v. Olmsted*, 1 New York, 483. See also *Hall v. Goodwin*, 2 Nott & McCord (So. Car.), 353; *Steele v. Thompson*, 11 Sergeant & Rawle (Pennsylvania), 84; *Mooberry v. Marge*, 2 Munford (Virginia), 453; *Edelen's Lessee v. Smoot*, 2 Harris & Gill (Maryland), 285.

In an early South Carolina case, however, *Jenkins v. Clement*, 1 Harper Equity, 72; 14 Am. Dec. 698 (1824), it was held to the contrary. The Court observed: "It is well known that many of the judges of England have regretted the rigor of the rule which required words of inheritance or perpetuity to give a fee in devises in real estate. For it is notorious that the rule tended to defeat the intention of the testators in nine cases out of ten at least. But the anxious desire of the law and the courts to watch over the interest of the heir-at-law introduced another rule, that the heir-at-law was never to be disinherited but by express words or plain and necessary implication. That rule introduced a perpetual struggle between the two principles, the duty of giving effect to the wills of testators and the desire to favor the heir-at-law, the main support of the landed aristocracy. Since the abolition of the rights of primogeniture, which flowed naturally and necessarily from the nature of our government, we have no such contending principles existing in our system. Equality of rights is equity, politically as well as morally. It is the duty of the Court to endeavor in the construction of

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wills to ascertain the intention of the testator, and to give effect to that intention, without regard to technical phraseology. In the case before us, the words of the will gave the land unqualifiedly to Mr. Clement, and I have no doubt that the testator intended to give a fee simple. I have no doubt, because in all such cases the testator would limit the estate for life or years, if he so intended. He makes no further disposition of the property, as he would have done if he had not meant to give a fee. Believing then that he meant to give a fee, I feel bound to give effect to that intent, notwithstanding the absence of words of inheritance or perpetuity."

The same was held in Connecticut, in 1795, in *Holmes v. Williams*, 1 Root (Conn.), 341, the Court observing: "In personal estate common sense prevails as to the construction of a bequest; in real estate it does not, and principally because it is the policy of Great Britain to keep estates in families, and not to suffer the heir to be disinherited, as is said by Lord MANFIELD, but by express limitations or words tantamount; no such policy however obtains here; all the heirs are as much entitled to the real as the personal estate." &c.

But a devise after a life estate, especially if made to one heir, with an evident intention of excluding the other heirs, has been construed to carry the fee. *Plimpton v. Plimpton*, 12 Cushing (Mass.), 458; *Butler v. Little*, 3 Greenleaf (Maine), 239; *Hall v. Dickinson*, 1 Grant (Pennsylvania), 240. In the Massachusetts case above, the Court by SHAW, C. J., said: "Where land is devised to one for life, and over to another, especially to a son, without words of limitation, or any further words to express his intent, such a devise over is construed to be a fee. The presumption is that such devise for life to a wife, with a gift over to a son, and without further limitation, was, in the mind of the testator, a final disposition of that part of his estate; and to effect that purpose it must be a devise of the fee." This construction was aided, in the mind of the Court, by the fact that subsequently in the will the testator gave to the same son the improvement of two other parcels for life, thus making a distinction between land and the improvement of land, and placing the two last described lots in contrast to the house and lot first given. So in *White v. Crenshaw*, 5 Mackey (District of Columbia), 113; 60 Am. Rep. 370, the Court said: "She first gives the property in express terms to her mother for life, thereby indicating that when she intended to give it for life she said so. Does not this indicate that she understood herself to be doing something quite different when she proceeded next to give the same house to her sister?"

Directly in opposition to the principal case, it has even been held that a devise without words of limitation may be supported as a devise in fee by coupling it with another which contained suitable words of limitation. *Cook v. Holmes*, 11 Massachusetts, 532; *Neide v. Neide*, 1 Rawle (Pennsylvania), 82; *Pattison v. Doe d. Thompson*, 7 Indiana, 282; *Charter v. Otis*, 41 Barbour (New York Supr. Ct.), 525.

So of a bequest of personalty. *Smith v. Bell*, 6 Peters (U. S. Supr. Ct.), 68.

In the Massachusetts case above the Court said: "The words of the particular devise to Gregory, considered by themselves, certainly give no inheritance. He devises to his grandson, Gregory, C., only child of his son, Daniel

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C., a certain piece of land in Watertown, containing, &c., without any words indicating the duration of the estate he meant to bestow, . . . according to the rules of the law, there can be no doubt that such a devise, standing alone, without any aid in the construction from other parts of the will, would amount only to an estate for life in the devisee." But resorting to other parts of the will, the Court discover that the testator omitted words of inheritance although he unmistakably intended to give a fee. As where he devised to his son Stephen a tract of land which he had previously deeded to him and on which he held a mortgage from Stephen, and where he devised other lands to his son, Israel, on condition of his paying one-half the legacies, without employing words of perpetuity in either instance. "Here are two estates in fee created by the will, clearly according to the intention of the testator; and yet he left that intention wholly unexpressed by any words made use of by him in the respective devises. It is hence probable that the testator did not know the use of technical language; and we cannot infer that he had an intention to give a life estate only to Gregory merely because we find no estate whatever expressed." This view was strengthened by the testator's evident desire to make an equal distribution among his children and grandchildren, as avowed in the last clause. "Should the devise to Gregory therefore be considered as only a life estate, the equality which the testator had in view would probably fail of being effected."

In *Neide v. Neide*, *supra*, the devise was, "my late purchase from E. C., also four acres of woodland, being in a corner," &c. The fee in the former was held to pass because it described the quantity of interest, and the fee in the latter was held to pass because coupled with it.

Many States have held that whenever an intention to devise the fee can be drawn from the whole will by any inference, it will be supported to the exclusion of the technical rule, and very slight circumstances will suffice. *Lummas v. Mitchell*, *supra*; *Cleveland v. Spilman*, 25 Indiana, 99; *Packard v. Packard*, 16 Pickering (Mass.), 193; *Leland v. Adams*, 9 Gray (Mass.), 171, containing a careful review of the English cases. The avowal of the intention to devise all his estate, the creation of a pecuniary or personal charge on the person of the devisee in respect to the land devised, a devise for a public object, like a school, or a devise of "all the residue," &c., or of a remainder to "children," the use of sweeping words and expressions, have been held sufficient to carry the fee. *Lindsay v. McCormack*, 2 A. K. Marshall (Kentucky), 229; 12 Am. Dec. 387; *Fox v. Phelps*, 20 Wendell, 437; *Barheydt v. Barhe*, 20 Wendell, 576; *Bell County v. Alexander*, 22 Texas, 350; *Rathbone v. Dyckman*, 3 Paige (New York Chancery), 9; *Johnson v. Johnson's Widow*, 1 Munford (Virginia), 549; *Parker v. Parker*, 5 Metcalf (Mass.), 131; *Gernet v. Lynn*, 31 Pennsylvania State, 94; *Lambert's Lessee v. Paine*, 3 Cranch (U. S. Sup. Ct.), 97; *Beall's Lessee v. Holmes*, 6 Harris & Johnson (Maryland), 205; *Tolar v. Tolar*, 3 Hawks (North Carolina), 74; *Executors of Decker v. Executors of Decker*, 3 Hammond (Ohio), 157; *Bradford v. Bradford*, 6 Wharton (Penn.), 236; *Thompson's Lessee v. Hoop*, 6 Ohio State, 480. In these cases, expressions as "my estate," "my plantation on which I live," "my worldly goods," "all the residue and remainder," "my property," "all I possess indoors and outdoors," have been deemed sufficient to carry a

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fee. The most instructive of this line of cases is *Neide v. Neide*, 4 Rawle (Penn.), 82, where the devise was of "my late purchase from E. C., as also four acres of woodland, being in a corner," &c., and the fee was adjudged to pass although no words of inheritance were used. The Court observed: "I shall notice only a few of the many cases on this subject, observing that many judges have said that when an unlearned man gives a horse, and in the same sentence or a different one gives a house, and the Courts decide that each shall not hold absolutely and forever, they always disappoint the intention of the testator. I admit however that we are not at liberty to decide that a simple devise of lands to a man, unconnected with anything else, passes a fee, for we would by so doing unsettle estates for some years back. The legislature alone can do it prospectively. Where the words used not only apply to land, but to the quantity of interest which the testator has in it, or which he disposes of, that interest passes. There are many contradictory cases, as between 'I give my estate,' or 'I give my estate in A.,' or 'My estate at A.,' but the law seems to have settled down in this, that each of these expressions passes a fee unless restrained by other parts of the will. 'All my effects,' 'whatever else I have in the world' (Talbot's Cases, 286), 'all I am worth,' 'what I die possessed of,' 'what is left after my debts are paid;' the words property, substance, and many others have been held to pass a fee. In short, there has been an astuteness to find a meaning which can justify or excuse the Courts in giving a fee where it is plain that the testator intended it; and though some Judges have held in some cases that their predecessors had gone too far, and have doubted some of the decisions, yet the current has still set in the same direction, and cases doubted by one Judge have been considered clear of doubt by his successors." "It is apparent however that it is not so much the particular word or phrase used, as the context, or the scope of the whole will, which passes the fee; every word and expression in the English language has different meanings in connection with different words or applied to different subjects. The express devise to a man and his heirs and assigns is often cut down by other expressions, or by being applied to a long lease, to estate tail or to an estate for years; and so a devise without words of addition may carry a fee if the expression used shows that the testator had in view the quantity of interest as well as the description of the property given. The rule once was that the heir-at-law cannot be disinherited by any other than express words or necessary implication. In *Fagge v. Heasman*, Willes, 141, Chief Justice WILLES shows that this rule though often repeated has not been acted on, and is inconsistent with many decisions of Judges who have used it, and he says the true rule is that it ought plainly to be the intent of the testator, or the heir will not be disinherited. In our own Courts the same principles have been laid down in nearly the same words." "The words 'my late purchase' as used, may and naturally do, as well as a description of the property, include a description of the estate or interest in the property. The case in 2 Vesey, 18, has nearly the same phrase, and was held to pass a fee." Citing also Hobart, 32. In *Harper v. Blean*, 3 Watts (Penn.), 471; 27 Am. Dec. 367, the words, "with whatsoever is not named that I have any right or claim to, either in law or equity," were held to vest a fee, citing several English cases, including *Ridout v. Pain*, 3 Atk. 188.

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The doctrine that a personal charge on the devisee excuses the absence of words of inheritance is also found in *Jackson v. Bull*, 10 Johnson (New York), 148; 6 Am. Dec. 321; *Heard v. Horton*, 1 Denio, 165; 43 Am. Dec. 659; *Bell v. Scammon*, 15 New Hampshire, 381; 41 Am. Dec. 706, and notes, 714; *Caney v. Jones*, 19 South Carolina, 297; 45 Am. Rep. 777.

The doctrine of aider by introductory words is found in *McIntyre v. McIntyre*, 123 Pennsylvania State, 329; 10 Am. St. Rep. 529.

In *White v. Crenshaw*, 5 Mackey (District of Columbia), 113; 60 Am. Rep. 370, the Court said: "The ordinary rule is that a devise of land without any indication of the extent of the interest devised, gives only a life estate. The question however is, whether there may be gathered, from expressions in other parts of the will, evidence that in using this language the testator intended to give a fee-simple. Undoubtedly the English rule is that such indications in other parts of the will affect only the provision to which they directly apply. They are not accepted as going to explain the testator's meaning in the use of phraseology elsewhere. But the English rule is founded upon reasons which do not exist with us. When the statute of wills was passed there already existed a policy to keep the estate together and in one hand. Therefore the Courts very properly declined to construe wills as taking the inheritance from the heir except upon plain expression of intent in the particular instance. But the policy of our law of inheritance is subdivision among heirs, so that our Courts are not called upon to watch over the inheritance for the same reasons. We are not at liberty, in construing a will, to ignore anything that suggests the testator's intention to take the inheritance from the heir; on the contrary, we are charged with a duty to observe these indications and to follow them in ascertaining the intention of the testator. In this case we find that where the testatrix gave a piece of land to two nephews in Baltimore, by just the same language, and without the use of the word 'heirs,' or any equivalent, she assumed that she had given them a fee-simple, and therefore went on to state what should be done in case of the death of either of them before they became twenty-one years of age. We learn in this way what the testatrix supposed and intended to be the effect of a devise of a described piece of property, without using words of inheritance or any particular equivalent for them, and we must be guided by her lexicon, and understand her language as she defines it."

In a Virginia case, in 1810, before the statute (*Johnson v. Johnson's widow*, 1 Munford, 549), a fee was held to pass because an illiterate testator used the same words in disposing of his real as of his personal property, and disposed of both in the same sentence, — "one hundred and twenty acres of land I bought of James Kitchen, and one cow." &c. (Citing *Rose v. Hill*, 5 Burr. 1884.) In addition the Court laid stress upon his giving the residue of all his estate to his wife for life or widowhood, and afterward to his son, and asks, "Why then did he not express himself in like manner as to this land, if indeed he intended to give only a life estate in it?" Still further, he gave his heir at law five shillings, which "creates a very strong presumption he had no intention he should ever inherit this one hundred and twenty acres." No remark is made on the phrase, "and I bought of James Kitchen," which in Pennsylvania would have been potent.

The rule in Shelley's case was early recognized in some of the United States, as New York and Connecticut, but is now almost uniformly rejected by statute. It is said still to exist in Delaware, *Griffith v. Derringer*, 5 Harrington, 281; and in Indiana, *Allen v. Craft*, 109 Indiana, 476; 58 Am. Rep. 125; and is the law of Pennsylvania, *Guthrie's Appeal*, 37 Pennsylvania State, 9; but so modified "as to deprive it of all fatal virus." 2 Redfield on Wills, p. 226.

Judge Redfield, who stands at the head of American writers on Wills, speaking of the rule in Shelley's case, says (2 Wills, p. 722): "But in all the American States, or nearly all, there has been considerable hesitation in regard to accepting and applying this rule to the fullest extent. It was always regarded as an artificial rule of construction in England, and one which tended to defeat the intent of the testator. And it has not received the unqualified indorsement of the English Courts in regard to devises. We should regret to find the American courts going further in the rigid application of such an unnatural rule of construction to devises than such English Judges as MANSFIELD and WILMOT were willing to go:" in *Doe v. Lausling*, 2 Burr. 1100. He then points out what he deems to be the reasonable limits of the rule, and adds: "But beyond this it seems to us the rule has no just application to deeds even, and surely not to devises. And the fact that in all the American States where the rule has been carried beyond this reasonable limit, the legislatures have interfered and repealed it, goes to show very satisfactorily that it has no just foundation, either in principle or in the instinctive perceptions of the people."

Mr. Schouler, another approved American writer on Wills, says (Wills, sect. 485): "This refined construction in favor of the heir, together with the refinements of exception built upon it, now gives way to the modern rule of interpretation as defined in the English Act of Victoria (1837), and corresponding enactments throughout the United States, many of them dating much earlier." As in New Jersey, Virginia, North Carolina, before the Union, and in New York in 1830. "This modern rule treats a devise of lands, though without words of limitation, as passing the fee simple to the devisee, unless an intention appear to the contrary. The natural scope of the will, as gathered from all its parts, thus settles in fine the question whether or not (*sic*) a devise in fee or such other complete interest as the testator had power to dispose of shall pass, or instead a mere usufruct and temporary enjoyment, leaving to the heir the ultimate benefits."

Mr. Bigelow in note (2 Jarman on Wills, p. 280), says: "That words of inheritance are unnecessary to carry a fee by will is everywhere held." Citing among other cases, *Whorton v. Moragne*, 62 Alabama, 201; *White v. White*, 52 Connecticut, 518; *Wetter v. Walker*, 62 Georgia, 112; *Siddons v. Cockrell*, 131 Illinois, 653; *Morgan v. McNeeley*, 126 Indiana, 537; *Bulfer v. Willigrod*, 71 Iowa, 620; *Pratt v. Leadbetter*, 38 Maine, 9; *Goodwin v. McDonald*, 153 Massachusetts, 181; *Tatum v. McLellan*, 50 Mississippi, 1; *Small v. Field*, 102 Missouri, 101; *Hance v. West*, 32 New Jersey Law, 233; *Crain v. Wright*, 111 New York, 307; *Flickinger v. Saum*, 40 Ohio State, 591; *Morris v. Potter*, 10 Rhode Island, 58; *Bell County v. Alexander*, 22 Texas, 350.

No. 3. — *Cooper v. France*, 19 L. J. Ch. 313. — Rule.

Messrs. Randolph and Talcott, in note (3 Jarman on Wills, p. 21), say: "The general rule that a devise without words of inheritance carries only a life estate prevails in this country in the absence of statute to the contrary." But they explicitly lay down the exceptions covered in the earlier part of this note.

Mr. Washburn (3 Real Property, p. 18), lays down the doctrine of the Rule, including the ineffectual character of a wish expressed in the will against the heir.

No. 3. — COOPER *v.* FRANCE.

(CH. 1850.)

RULE.

THE object of the Inheritance Act, 1833 (3 & 4 Will. IV. c. 106) is to vary the mode of tracing the succession to lands, but it has not altered the pre-existing law with respect to the devolution in the direct line in the descending scale.

An intestate, who was seized in fee of lands, died leaving two daughters who survived him. Both daughters died intestate, each leaving a surviving son. It was held that the moiety of each daughter descended upon her son.

Cooper v. France.

19 L. J. Ch. 313-314 (s. c. 14 Jur. 214).

Statute 3 & 4 Will. IV. c. 106. — Descent.

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G. T., seized in fee of certain hereditaments, died intestate, leaving two daughters Ellen and Sarah. Both daughters died intestate, each leaving a son. It was contended for George, the son of Ellen, who died first, that under the 2nd section of the act 3 & 4 Will. IV. c. 106, upon the death of Ellen her moiety descended equally between him and Sarah, as co-heirs of G. T., the original purchaser; and that upon the death of Sarah, her original moiety as well as the half of Ellen's moiety, descended equally between her son and the son of Ellen, as co-heirs of the original purchaser: — *Held*, that the said statute was not intended to apply to cases which were plain before it was passed; and that the moiety of each daughter descended upon her son.

The bill stated that George Tomlinson died intestate on the 13th of April, 1826; and that at the time of his decease he was seised in fee of certain hereditaments in the county of Middlesex;

that the intestate left two daughters, his co-heiresses-at-law, namely, Ellen Cooper and Sarah France, who entered into and continued in the possession of the property until their deaths; that Ellen Cooper died intestate on the 1st of June, 1835, leaving George Cooper, her eldest son and heir-at-law; that Sarah France died intestate on the 16th of January, 1839, leaving Benjamin France, her eldest son and heir-at-law. The bill was filed by George Cooper against Benjamin France for a partition, and a question was raised for the decision of the Court as to what shares in the property belonged to the plaintiff and the defendant, and as to what effect the 2d section of the 3 & 4 Will. IV. c. 106¹ had upon the case.

Mr. Rolt and Mr. Willcock, for the plaintiff, George Cooper, contended that he was entitled to five-eighths of the property; that by the 2d section of the 3 & 4 Will. IV. c. 106, it was directed that in every case descent should be traced from the purchaser. The person last entitled to the land was to be considered to have been the purchaser, unless such person had inherited the same, in which case the person from whom he inherited was to be considered the purchaser; consequently, in this case, George Tomlinson was to be considered the purchaser, and therefore on the death of Ellen Cooper her moiety descended equally upon her son, George Cooper, and Sarah France as co-heirs of George Tomlinson, and upon the death of Sarah France, her share, consisting of her original moiety and the moiety of her sister's [* 314] share, being six-eighths of the property, *descended in like manner upon her son, Benjamin France, and George Cooper, as the co-heirs of George Tomlinson. By this means George Cooper, the plaintiff, was entitled to two-eighths of his mother's moiety, and three-eighths of Sarah France's moiety.

Mr. Malins and Mr. Shee for the defendant, Benjamin France, contended that he was entitled to one moiety of the whole prop-

¹ 3 & 4 Will. IV. c. 106, s. 2. "And be it further enacted, that in every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall for the purposes of this act be considered to have been the purchaser thereof, unless it shall be proved

that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same, and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same."

No. 3. — *Cooper v. France*, 19 L. J. Ch. 314.

erty; that the section of the act referred to did not affect this question, for otherwise it would produce this absurdity, — that Benjamin France would take one-eighth less after the passing of the act than before it. It never could have been the intention of the legislature to alter or unsettle the law where it had always been perfectly clear; and in this case, under the law as it stood before the act, Ellen Cooper's moiety would have descended upon her son George, and Sarah France's moiety upon her son Benjamin. This rule had always been applied to questions which had been raised with regard to a barony. The descent was always traced separately, and the heir of each co-heiress succeeded to the rights of his mother. If any other construction were to be acted upon, the eldest son of a co-heiress would no longer be the heir of his mother, but though the act directed the descent to be traced from the original purchaser, still it did not regulate the mode of descent, it merely stated that none who were not of the blood of the purchaser should take, and what the parent had, the issue would take, only qualified with this, that such issue must be of the blood of the purchaser.

The VICE-CHANCELLOR (Sir LANCELOT SHADWELL): I cannot see that there is any doubt about this case. The question is, whether the act applies to cases which were perfectly plain before the act, — whether, where a lady dies, leaving one child only, there is any necessity for making a question about the descent. I cannot suppose that the act even meant to introduce doubt into a case which was so plain that before the act no doubt could have existed. It seems to me that the meaning of the act was to leave the law of inheritance, in cases absolutely plain, just as it found them, and only to lay down rules where there was any doubt existing. In looking at the purview these words occur, “to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title require;” and then the 2d section says, that the person last entitled to the land shall be considered to be the purchaser thereof, unless it shall be proved that he inherited the same; but it appears to me that the act is then speaking only of what ought to be the rule where the case is doubtful. I cannot say that the act shall be so construed as to give a new rule where no doubt existed before the act. The act was passed expressly to make the thing clear, and it would be absurd to construe it so as to raise a doubt upon what was

already perfectly clear. I was at first inclined to think this case ought to have been sent for the opinion of a court of law, but I must say that it now appears to me so clear, that I shall not send it to law; I shall therefore make a declaration that one moiety did, upon the death of Ellen Cooper, descend on her son, George Cooper, and the other moiety did, on the death of Sarah France, descend upon her son, Benjamin France.

ENGLISH NOTES.

The Inheritance Act 1833 was one of a series of statutes passed in consequence of the report of the Commissioners of Real Property. The rules established by this Act and the amending Act, 22 & 23 Vict. c. 35, are as follows:—

In every case the descent is to be traced from the purchaser: s. 2.

The person last entitled to the land is to be taken to be the purchaser, unless it shall be proved that he inherited it. In that case the person from whom he inherited it is to be considered to have been the purchaser, unless it shall be proved that he inherited it: *ibid*.

Where there is a total failure of heirs of the purchaser, or where lands are descendible as if an ancestor had been the purchaser, and there is a total failure of the heirs of the ancestor, the descent is to be traced from the person last entitled to the land, as if he had been the purchaser thereof: 22 & 23 Vict. c. 35, ss. 19 & 20.

The person last entitled to the land includes the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof: 3 & 4 Will. IV. c. 106, s. 1.

Formerly a man could not make his right heirs take by purchase: see *Pibus v. Mitford* (1675), 1 Vent. 372; *Wills v. Palmer* (1770), 5 Burr. 2615, 1 W. Bl. 687. This rule was abrogated by the Inheritance Act 1833, s. 3, and the heir takes by force of the devise, and not by descent. It would appear however that the heir might disclaim, and that he would then be in by descent: *Bickley v. Bickley* (1867), L. R., 4 Eq. 216, 36 L. J. Ch. 817.

Where the heir takes by purchase under limitations to the heirs of his ancestor, the land descends as if the ancestor had been the purchaser: 3 & 4 Will. IV. c. 106, s. 4.

The rules thus established respecting the tracing of the descent from the actual purchaser, or the person deemed to be the purchaser, is applicable to lands of all tenures, including customary tenures: 3 & 4 Will. IV. c. 106, s. 1.

In the descending scale the old law remains in force: *Cooper v.*

No. 3. — Cooper v. France. — Notes.

France, the principal case. Where however there is a total failure of descendants of the purchaser, the Inheritance Act 1833 provides that the line shall be traced backwards: *ibid.* s. 6.

The immediate lineal ancestor of the purchaser is preferred to any other person who would have been entitled to inherit, either by tracing his descent through the lineal ancestor, or in consequence of there being no descendant of the lineal ancestor, so that the father is preferred to a brother or sister, and a more remote lineal ancestor is preferred to any of his issue, other than a nearer lineal ancestor and his issue: *ibid.*

The descent from a person in the pedigree to his or her brother or sister must in every case be traced through the parent: *ibid.* s. 5.

In the ascending scale, the male line is preferred to the female line, so that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, are capable of inheriting until all the paternal ancestors of that person, and their descendants have failed; and no female paternal ancestor of such person, nor any of her descendants, are capable of inheriting, until all the male paternal ancestors and their descendants shall have failed, and no female maternal ancestor of such person, nor any of her descendants, are capable of inheriting until all the male maternal ancestors and their descendants shall have failed: 3 & 4 Will. IV. c. 106, s. 7. A person making title in part through the ascending line need only present a *prima facie* case by having issued advertisements and made reasonable enquiries, to prove failure of the male line and the descendants of the male line at any period, in order to let in the female line and the descendants of the female line: *Greaves v. Greenwood* (C. A. 1877), 2 Ex. D. 289, 46 L. J. Ex. 252, 36 L. T. 1, 25 W. R. 639; *Kennedy v. Lyell* and appeal *s. n.* *Lyell v. Kennedy* (1887, 1889), 18 Q. B. D. 796, 14 App. Cas. 437, 56 L. J. Q. B. 303, 59 L. J. Q. B. 268, No. 1 of "Discovery," *post*.

Where the female ancestral line is resorted to, the mother of the more remote male ancestor, and her descendants, are preferred to the mother of a less remote male ancestor, and her descendants. Here again it is only necessary to show a *prima facie* case: *Greaves v. Greenwood*, *Kennedy v. Lyell*, *Lyell v. Kennedy*, *supra*.

Provision is now made for the admission of the half-blood. Where the common ancestor is a male, the relation by the half blood inherits next after any relation in the same degree of the whole blood. Where the common ancestor is a female, the half blood inherits next after the common ancestor: 3 & 4 Will. IV. c. 106, s. 9.

AMERICAN NOTES.

The rules of Descent are universally prescribed by statute in the United States, and although they vary materially in the different States, there is probably no variation from the doctrine of the Rule of the principal case. A useful abstract of the statutes of Descent may be found in 3 Washburn on Real Property, 5th ed., p. 21, *et seq.*

 DETINUE.

No 1. — CROSSFIELD v. SUCH.

(EX. 1852.)

No. 2. — LATTER v. WHITE.

(H. L. 1872.)

RULE.

THE gist of an action of detinue is the detainer.

The return of the goods to the plaintiff after action brought destroys the cause of action so far as it is founded on a claim to the goods or to their value; and the plaintiff, in that case, can only recover the loss that he has suffered by reason of the detainer.

Crossfield v. Such.

22 L. J. Ex. 65-67 (s. c. 8 Ex. 159).

[65] *Detinue. — Pleading. — Delivery up of Goods to Plaintiff. — Plea to Damages.*

In detinue for goods, if all or any are delivered up after action brought, the plaintiff cannot have judgment to recover the goods so delivered to him, or their value; but may have judgment to recover damages for their detention, if he has sustained any damage; and may have judgment to recover the residue of the goods or their value, and damages for their detention.

Payment into court by way of amends may be made in detinue, that action being a personal one within the 3 & 4 Will. IV. c. 42, s. 21.

To detinue for goods, the defendant pleaded, first, except as to part of the goods, *non detinet*; secondly, as to that part, that the plaintiffs ought not further to maintain their action in respect thereof, because after the commence-

No. 1. — Crossfield v. Such, 22 L. J. Ex. 65.

ment of the suit the defendant delivered the same to the plaintiffs, who accepted and received them: thirdly, as to the damages sustained by the detention of those goods, payment into court of 1s., averring no damages *ultra*: *Held*, on general demurrer, that the second and third pleas were good.

Detinue for goods consisting of chairs, tables, and other household furniture. First plea, except as to part of the goods, *non detinet*; secondly, as to that part, that the plaintiffs ought not further to maintain their action in respect thereof, because the defendant after action brought delivered the same to the plaintiffs, who then accepted and received them; last plea, as to the damages sustained by the plaintiffs by the detention of those goods, payment of 1s. into Court, with an averment that the plaintiffs had not sustained damage to a greater amount by reason of the said detention.

General demurrer to the last two pleas.

Willes, in support of the demurrer (Nov. 17), was stopped by the Court.

Lush, *contra*, for the defendant. — The pleas are good. The action of detinue is a peculiar action, and differs from trover in this respect, that it is brought to recover the goods themselves, or the value thereof, and damages for the detention. That being the case, a re-delivery and acceptance of part of the goods after action brought is a good answer *pro tanto* to the further maintenance of the action. In Vin. Abr. tit. "Detinue," D, 5, pl. 58, the law is thus stated: "Detinue of divers parcels of goods, tender of part of them is a good plea of them before verdict." Brooke's Abr. tit. "Tender," pl. 39, cites 1 Ric. III. *Williams v. Archer*, 5 C. B. 318; 17 L. J. (N. S.) C. P. 82, was an action of detinue for railway scrip, which had been delivered up to the plaintiffs after action brought. It was held, that the jury in estimating the damages might take into consideration the difference in value of the scrip at the time of the demand and at the time of its delivery to the plaintiffs, and that, as the scrip had been re-delivered, the verdict and judgment were properly confined to an assessment of damages for the detention.

[PARKE, B. A delivery and acceptance are equivalent to a tender; if, therefore, a tender is good, *a fortiori* a delivery and acceptance are better.]

It is not contended, on behalf of the defendant, that the plea to the damages is good on special demurrer, but the argument is, that

it is good in substance. *Williams v. Archer* proceeded on the principles laid down in *Henry v. Earl*, 8 M. & W. 228; 10 L. J. (N. S.) Ex. 265. The plaintiffs might, in the present case, have taken issue on the sufficiency of the damages.

Willes. — In *Williams v. Archer* the jury found that the goods had been re-delivered to the plaintiffs, and, therefore, they were warranted in confining their verdict to an assessment of damages for the detention of the goods. A plea similar to the second plea in this case was not necessary, and, therefore, is not allowable. The case of *Williams v. Archer* shows that the jury may find by their verdict that the goods were delivered up, and so may excuse themselves from finding damages in respect of the value of the goods. The law is thus stated in Fitz. N. B. "Writ of Detinue," 139: M: "And if a man have goods delivered over to another, and afterwards a writ of detinue is brought against him, by him who hath right unto the goods; now, if the defendant [* 66] defending the action deliver the goods * over to whom they were bailed to him for to deliver, the same is a good bar in the action, because he hath delivered them according to the bailment made unto him." In Com. Dig. "Pleader," 2, X, 5, it is stated that a defendant in detinue may plead "*Uncore prist.*"

[Lush. A similar plea was held bad in *Clements v. Flight*, 16 M. & W. 42; 16 L. J. (N. S.) Ex. 11.]

[PLATT, B. The jury were at liberty to assess the damages with respect to a particular portion of the goods. *Henry v. Earl* differs from the present case, as that was a case of accord and satisfaction. If this form of plea is allowed, the plaintiffs may be put to the expense of trying whether the goods were returned or not. If your argument is right, you may obtain judgment that the goods may be delivered up a second time.]

The jury would not find such a verdict, and if they did, the Court would interfere by virtue of its equitable jurisdiction, and prevent any injustice from being done.

Lush, in reply. If the defence set up by the second plea were established at the trial, it would be a good answer. The substance of the argument on the other side is, that the second plea amounts to *non detinet*. If the plaintiffs' view is correct, the judgment of the Court would be that the defendant would be bound to deliver up the goods twice over. The plea is good in substance, and is a good defence to the further maintenance of the action.

[PARKE, B. — The question in this case turns upon the meaning of the passage in Brooke's Abr. tit. "Tender," pl. 39, relating to tender before verdict.] *Cur. adc. vult.*

The judgment of the Court¹ was now delivered by —

POLLOCK, C. B. His Lordship stated the pleadings, and proceeded: In this case we are of opinion, after consideration and upon reference to the old authorities, that both pleas are good. As to the second, it is to be observed that it is pleaded in bar only of the recovery of the goods specified or their value; and it seems to be highly reasonable to hold, that the object of the suit being to recover the goods *in specie* or their value, to be assessed by the jury, and also damages occasioned by their detention, the first object is completely answered by delivering to, and an acceptance by the plaintiffs of the goods since the commencement of the suit; leaving the plaintiffs to recover by verdict of the jury the damage they have sustained by the goods being improperly detained. The old authorities completely bear out this view of the case. In Brooke's Abr. tit. "Tender," pl. 39 (referred to in Vin. Abr., tit. "Detinue," b. 5, pl. 58), it is said, "Detinue de divers p'ceels bins, tend del part de eux est bõ ple del eux devàt v'dict, & e contra puis v'dict, ou inq'st taxe un somm ingrosse pur damẽ. del tous les biens, & ne severa les damẽ." Brooke refers to Fitz. Abr. tit. "Verdit," pl. 13, and Fitzherbert refers to the Year-Book, 1 Ric. III. fol. 1, where the case is found at length. That case was heard before all the Judges. It was an action of detinue for several goods which were estimated in value at one sum in the declaration and before the jury; and the question was, whether any judgment could be given upon verdict, and the majority were of opinion that it could be given for the whole value, and if all the goods were not given up and one article was withheld, the defendant was liable for the value of all: the contention on the part of the defendant having been that the different goods should have been valued separately, so that if one chattel only was withheld the defendant would be liable for the value of that chattel only; and, according to the report in the Year-Book, this was generally thought right, although the majority of the Judges decided otherwise. In the course of the discussion, FAIRFAX, J., said, that in detinue for two things the defendant might at first have given up one and pleaded as to the

¹ POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.

other, which seems to have been conceded; and the inconvenience insisted on the other side might have been avoided if it took place before verdict, — after verdict it was too late, — and then to pay the value of all if one article was not delivered up. This is very clear and intelligible. If there is a good defence to part of the goods by reason that the defendant was always ready to [* 67] * deliver, and the jury assessed the value of the residue of the goods, and, we presume, damage also, but none as to the other goods actually delivered up, yet, if there was no defence as to the part delivered up, then the jury will assess the value as to the residue and damages for the prior detention of the part delivered up. In another case, however, a part of the goods was produced in court and delivered to the plaintiff; the defendant had the benefit of the delivery and no damages were assessed against him; he was simply amerced, probably because the articles sought to be recovered were deeds, and no damage shown by their having been detained. That case was in the 38 Edw. III., fol. 36, and it is stated: “Detinue brought for deeds; some were produced; the defendant pleaded *non detinet* as to the remainder; those produced were delivered up to the plaintiff; the defendant was amerced for the detainer.” And in the subsequent case, 36 Hen. VI. fol. 26, b., also of detinue of deeds, the Court refused the prayer of damages for detention of the deeds, as to which the defendant said nothing, because the plaintiff had not been delayed, and they gave him judgment to recover the deeds only. It seems, therefore, in detinue for goods, that if all or any are delivered up after suit, the plaintiff can have no judgment to recover them or their value, for that would be *actum agere*; but he may have judgment to recover damages for their detention if the plaintiff has sustained any, otherwise not; and for the residue the plaintiff may have the usual judgment to recover them or their value, and damages for their detention; and it seems to us, therefore, that the plea as to the goods delivered up is good, and that the plaintiffs ought not to have judgment to recover what they have already got. The last plea is payment of money into court on account of damages for the detention. In the 3 & 4 Will. IV. c. 42, s. 21, there is a provision which seems to us to apply to all actions with the exceptions mentioned, of which detinue is not one. In all personal actions money may be paid into court by way of compensation or amends; this is a personal action, in

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which such compensation or amends is sought to be recovered, although the goods or their value are also sought to be recovered. The case is within the words and spirit of the act, and we think this plea is also good. There will be, therefore, judgment for the defendant.

Judgment for the defendant.

Latter v. White.

41 L. J. Q. B. 342-348 (s. c. L. R., 5 H. L. 578).

Detinue for Bills against Surety. — Right of Creditor to Composition after disputing Validity of Deed. — Special Case. — Power of Court of Error to draw Inferences. — 23 & 24 Vict. c. 126, ss. 4-10.

Detinue does not lie against the maker of a promissory note after he [342] has delivered it to a properly constituted stakeholder, though he may have forbidden the stakeholder to hand it over to the person claiming it, and in whose favour it was drawn.

The trustee of a composition deed holding the bills or notes of the debtor or of his surety for the benefit of creditors is such a stakeholder.

This was a proceeding in error against a judgment of the Court of Exchequer Chamber reversing a judgment of the Court of Queen's Bench.

The action was brought in 1869, by the now plaintiff in error, to recover from William White the amount of three promissory notes, and also in detinue to recover possession of the same notes, the said notes having been executed by William White jointly with, and as surety for his son, W. A. White, in performance of a covenant in that behalf contained in a composition deed made between W. White and W. A. White and certain of the creditors of W. A. White, and having been in further pursuance of such deed delivered by the father and son to the trustees named in the deed.

The circumstances out of which the action arose may be briefly stated as follows:—

In November, 1867, W. A. White, the son, being a trader and then in difficulties, called a meeting of his creditors to investigate his affairs, when it was found that his estate would not pay more than 7s. 6d. in the pound. Thereupon the defendant, William White, in order to save his son from bankruptcy, with which the * creditors threatened him, made his son's [* 343] creditors the following offer, viz., first, to secure to the creditors a dividend of 10s. in the pound on the amount of their

debts, if they would accept that composition in full discharge of their respective debts, and would execute a composition deed, to be registered in bankruptcy; secondly, the payment of the composition to be secured by the joint and several promissory notes of the debtor, W. A. White, and his father the now defendant, William White, such notes to be made and delivered to trustees for the creditors within seven days after the registration of the deed; thirdly, the assets of the estate of the debtor to belong to the defendant, William White.

The offer was embodied in an agreement, and was accepted by the creditors, and among them by the plaintiff, who was a creditor for £2115, and who signed the minutes of the agreement on the 29th of November, 1867.

A deed was accordingly prepared, which was executed by the debtor and by his father on the 16th of December. But on the 17th of December the plaintiff wrote a letter withdrawing his assent to the proposed arrangement, on the ground that the balance-sheet laid before the creditors by or on behalf of W. A. White was not correct, and that the consents of the creditors had therefore been obtained by fraud. But the solicitors to Messrs. White returned answer that the deed was sufficiently executed to bind non-assenting creditors, and that it would be registered forthwith, and they denied that the balance-sheet was not correct.

The composition deed was registered on the next day, the 18th of December, under section 192 of the Bankruptcy Act, 1861, and within seven days after such registration the defendant and his son made and delivered to the trustees named in the deed their joint and several promissory notes for the payment to the several creditors of the son the respective amounts due to them as the composition of their respective debts; and soon after William White proceeded to realise the assets of his son, the debtor. On the 24th of December notice was sent to all the creditors of the delivery of the notes to the trustees. All the creditors, except the plaintiff and one other, accepted the promissory notes and executed the deed, and the notes so accepted were paid at maturity. In February, 1868, the plaintiff commenced an action against W. A. White, the son, for the amount of his debt, and, when the promissory notes were formally tendered to him, he refused to accept them.

The action thus brought against the son was referred to an

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arbitrator, and the question raised before the arbitrator was as to the validity of the deed. But the son retired from the reference, and the award was made in favour of the plaintiff, the deed being thus found to be bad and not binding on dissenting creditors, and a verdict was subsequently entered up for the plaintiff for the amount he claimed.

In consequence of this action, brought against the son, he and his father served upon the trustees a notice, dated the 7th of January, 1869, not to deliver their joint and several promissory notes to the plaintiff if he should apply for them, and on the 1st of March, 1869, the son was adjudicated a bankrupt.

On the 16th of April, 1869, the plaintiff made a demand on the trustees for the promissory notes, but, in consequence of the notice of the 7th of January, the trustees refused to deliver them, assigning as a reason the notice of the 7th of January.

On the 21st of April the plaintiff commenced another action, this time against the father, for detainue of the above-mentioned promissory notes, with the usual money counts. The defendant pleaded the above facts, and the verdict obtained by the plaintiff against W. A. White on the ground that the deed was bad and not binding on dissenting creditors. He also pleaded that he was not possessed of the notes and did not detain them. By consent of all parties the record was withdrawn, and the opinion of the Court was sought upon a Special Case.

The Court of Exchequer Chamber reversed the judgment [344] of the Queen's Bench on the ground that as no power was reserved to them to draw inferences, they could not decide whether the deed was a valid deed or not, and unless it were found acknowledged by the plaintiff that the deed was valid and binding on him he was estopped by the judgment he had obtained on the express ground that the deed was not valid or binding against him; that therefore he must fail so far as his action was founded on the money counts; and as to the count in detainue, as the defendant was not in possession of the notes, he could not be said to detain them, and the plaintiff must fail on that count also. The case in both the Courts below is reported in 40 L. J. Q. B. pp. 9-162; in the report at p. 12 of that volume the Special Case is set out at length.

Error was brought to this House.

Sir J. Karlake and Day (with them J. Murphy) for the plaintiff.

[345] Mr. Brown, Sir G. Honyman, and Mr. Francis for the defendant in error, were not called on.

The LORD CHANCELLOR (LORD HATHERLEY). — [His Lordship stated the facts, and said]: The first question that arises here is as to the form of the action. It certainly appears to all of your Lordships that it was brought in a very singular form. The promissory notes were in the hands of the trustees; they had been placed in their hands, it is true, to be delivered over to the parties who should apply for them. This gentleman had originally refused to make any application for the notes. The notes remained in the hands of the trustees, and after all these proceedings had taken place against the son, then an application was made by the appellant for the notes. The parties who held them appear to me, I confess, to be in the position of stakeholders; they are stakeholders as between the son and the plaintiff in the present action. What happened was this: The father and the son together having executed the notes, and the father, being dissatisfied with what had taken place in this course of proceeding against the son, gave notice to the holders of the notes not to part with them, and thereupon they declined parting with them. I should have thought that if an action could be brought at all, the proper form of action to have been adopted by the plaintiff would have been an action against the trustees for non-delivery of the notes; but instead of that he brought an action against the father in respect of this order, which it is said he gave for the non-delivery of the notes. The trustees chose to act upon that order, and to withhold the notes. The father did not ask to have them delivered back to him or to his son; he asked no such thing as that, he did not profess to be the sole owner of the notes, so as to be entitled to have a re-delivery of the notes to him; all that he said was, do not deliver them to the person who is making the present application. I apprehend that in such a state of things as that he has no right to bring an action of detinue against a person who neither has the notes nor is entitled to demand them back from the trustees. I see no reason why he should be considered to be in a position in which he had absolute control over the notes. And certainly nothing that has been stated of the facts in this case makes it clear to me that the trustees were his servants or his agents, so as to be in a condition to act solely on his account, so as to be able to say in a Court that what was done by them was

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done by him, the defendant, in the present action. He gave this order either rightly or wrongly. Whether he was entitled to give it or not, is not in that respect of consequence, because the sole question is whether or not at that time the trustees were holding the notes as mere stakeholders, and were bound to hold them for the party entitled, but not bound to hold them absolutely for him. He gave them an order not to part with them: of course if they were simply his servants the action was properly brought against him, but if they were in any other position than that of his servants, the action was wrongly brought against him. Here was a stakeholder holding the notes, and one party said, "Deliver them to me;" the other party said, "Do not deliver them, I forbid it." The consequence is that the course of procedure should have been some mode of proceedings to bring that matter to an issue, but not, I apprehend, by bringing an action of detinue against the person who had not the notes at all nor any power over them, but had simply given an order to the persons having the notes in their possession not to part with them.

Then the action takes another form. There are counts in which the notes are declared upon as if the plaintiff were the holder of them. Manifestly he was not the holder of them, they have never been parted with to him. He says it must be one of two things, either the trustees are agents holding them for me, in which case, clearly and *simpliciter*, I am the holder, or they must be holding them for the defendant in the action, and then I am right in bringing my action of detinue *against him. [* 346] But it appears to me that a third case may be that these gentlemen are holding the notes for the proper person, whoever he may be, who may eventually turn out to be entitled to them, but it would be absolutely inconsistent with his action of detinue to say that the defendant holds them, because, as it appears to me, the defendant is only asserting a right to stop the party who is attempting to get possession of them, and it does not on that account follow that he is the proper object of an action of detinue, and that the notes can be recovered from him, he not being in possession of them, and the plaintiff on the other hand not being in possession of them either, the true state of the case being simply that they are in the possession of these trustees who are holding the property in dispute.

That appears to me at once to be a fatal blot in this case.

[After observations relating to the validity of the composition deed, and the power of a Court of Error to draw inferences, the

LORD CHANCELLOR concluded]: —

[347] It appears to me, therefore, my Lords, that the only mode of arriving at justice in this case, or rather of enabling the parties to arrive, if they think fit, at justice in the case, will be for your Lordships to affirm the judgment of the Court below, and dismiss the appeal, as usual, with costs; and to say that this affirmance shall be without prejudice to any application which the appellant may be advised to make to the Court of Bankruptcy with respect to the matters in question.

Lord COLONSAY concurred.

Lord CAIRNS: —

[After some observations upon the arguments which had been used as to the validity and effect of the deed], —

But the difficulties which we have to encounter in the present case, before we can arrive at a decision upon these arguments, are these. In the first place, we have an action of detinue brought for the recovery of these promissory notes, not against the person or persons who hold the promissory notes, but against another person who has given notice to the holders of the notes not to part with them. The persons who hold the notes are clearly not his servants or agents, they are independent persons, trustees appointed *in medio* between him and the creditors under the deed, — and his notice may be right or it may be wrong, but it appears to me to be impossible to say that the possession of the notes by the trustees is the possession of the defendant in the action, and that therefore the defendant is liable to an action of detinue for detaining these notes which are not in his possession.

I am sorry to say that this appears to me to be an absolutely fatal impediment in the way of the plaintiff. I think if [* 348] your Lordships were to disregard that * impediment, the result would be a decision of the House affirming that an action of detinue will lie as against a person who has given notice to trustees not to part with some property which is in their possession. It seems to me that that would be a most alarming doctrine, and one for which there is no foundation that I am aware of in any authority.

[After dealing with the questions as to the validity of the composition deed, and the power of a Court of Error to draw inferences, Lord CAIRNS concluded]: —

 Nos. 1, 2. — Crossfield v. Such; Latter v. White. — Notes.

I quite concur with the order, which it is now proposed that your Lordships should pronounce, namely, that this appeal should be dismissed, and that the judgment of the Court below should be affirmed with costs, but that this should be without prejudice to any application which the appellant may be advised to make to the Court of Bankruptcy touching the matters in question in this case.

Judgment of the Court of Exchequer Chamber affirmed, with costs, but without prejudice to any application which the plaintiff may be advised to make to the Court of Bankruptcy in respect to the matters in question.

ENGLISH NOTES.

The first part of the rule is supported by the following cases: *Gledstones v. Hewitt* (1831), 1 Cr. & J. 565, 1 Tyr. 445; *Whitehead v. Harrison* (1844), 6 Q. B. 423, 13 L. J. Q. B. 312, 2 Dowl. & L. 122; *Clossman v. White* (1849), 7 C. B. 43, 18 L. J. C. P. 151, 6 Dowl. & L. 563.

The word “detain” in the declaration meant that the defendant withheld the goods, and prevented the plaintiff from having the possession of them. *Clements v. Flight* (1846), 16 M. & W. 42, 16 L. J. Ex. 11, 4 Dowl. & L. 261. Accordingly an averment that the defendant was ready and willing to deliver possession to the plaintiff was a bad plea. s. c. This case also shows the nature of the evidence which is necessary to support the action. In *Mills v. Graham* (1804), 1 Bos. & P. (N. R.) 140, 8 R. R. 767, goods were delivered to the defendant, who was an infant, by the plaintiff who was ignorant of the infancy, for the purpose of executing some work upon them. The plaintiff demanded back the goods, offering to pay anything that might be due, but the defendant refused to return them and declared that he would contest the matter at law, as he was under age. The Court held that the infant, having repudiated the contract, might be treated as having obtained the goods by wrong, and that the plaintiff was entitled to recover. Had a contract existed, the plaintiff might have been in a difficulty. *Jennings v. Rundall* (1799), 8 T. R. 335, 4 R. R. 680.

Detinue will lie against a bailee, if the goods have been lost. *Reeve v. Palmer* (Ex. Ch. 1858), 15 C. B. (N. S.) 84, 28 L. J. C. P. 168. If the goods have been parted with to another before action, the action will also lie. *Jones v. Doule* (1841), 9 M. & W. 19, 11 L. J. Ex. 52, 1 Dowl. N. S. 391.

Where the goods have been parted with to a third person the plaintiff

may maintain an action against the parties jointly where there is a joint detainer, *Garth v. Howard* (1832), 5 Car. & P. 346, 8 Bing. 451, 1 Moo. & Sc. 628; or he may maintain an action against the person in whose hands the goods are. *Dirks v. Richards* (1842), 5 Scott N. R. 534, 4 Man. & Gr. 574, Car. & M. 626.

Where the goods have been originally pledged by the plaintiff, and re-pledged by the pledgee, the plaintiff must tender the sum for which he originally pledged the goods. *Donald v. Suckling* (1866), L. R., 1 Q. B. 585, 35 L. J. Q. B. 232, 14 L. T. 772, 15 W. R. 13. He need not tender the sum for which the pledgee is liable, if in excess of the amount of the original pledge. *Dirks v. Richards, supra*. An action of detinue cannot, however, be maintained against a mortgagee by deposit of title deeds, until he has been paid in full; and tender of a sufficient amount which is rejected is not, for this purpose, equivalent to payment. *Bank of New South Wales v. O'Connor* (P. C. 1889), 14 App. Cas. 273, 58 L. J. P. C. 82, 60 L. T. 467. In that case the decisions of the Court of Common Pleas, in *Chilton v. Carrington* (1854), 15 C. B. 95, 730, 24 L. J. C. P. 10, 78; s. c. (1855), 16 C. B. 206, 24 L. J. C. P. 153, were explained.

Where goods are seized as a distress for rent, and a sufficient sum is tendered, an action of detinue will lie if the tender is made before the impounding. *Loring v. Warburton* (1858), El. Bl. & El. 507, 28 L. J. Q. B. 31, 4 Jur. N. S. 634. The action will not lie, where the tender is after the impounding of cattle distrained damage feasant. *Singleton v. Williamson* (1862), 7 H. & N. 747, 31 L. J. Ex. 287, 5 L. T. 645.

An agent has, under exceptional circumstances, been held entitled to maintain an action of detinue against his employer. *Craig v. Shedden* (1858), 1 Fost. & Fin. 553. There an attorney was entrusted by the Court with documents, which he undertook to return. The client obtained these documents from the attorney. The latter was held entitled to maintain the action in order to recover them. To the same effect is *Sands v. Shedden* (1858), 1 Fost. & Fin. 556.

Where several are interested in chattels, the first of the persons interested who obtains possession is entitled to retain it against the others. In an action of detinue, the defendant may set up this title in bar of the action. This was allowed against one of two or more joint tenants or tenants in common. *Atwood v. Ernest* (1853), 13 C. B. 881, 22 L. J. C. P. 225, 17 Jur. 603, 1 C. L. R. 738; *Morgan v. Marquis* (1853), 9 Ex. 145, 23 L. J. Ex. 21.

A beneficiary was held not entitled to maintain an action of detinue against the bailee of the trustee. *Foster v. Crabbs*, No. 14 of "Deeds" 8 R. C. 672. A person obtained from the Herald's College a grant of arms

to be borne by himself and the descendants of his brother. The brother had two sons, the elder of whom was the heir-at-law of the grantee, and the other his executor jointly with another. The grantee bequeathed all his household goods and effects to his wife, who took possession of the grant. The nephews were held not to have such an exclusive interest in the grant as would entitle them to maintain an action against the widow. *Stubs v. Stubs* (1862), 1 H. & C. 257, 31 L. J. Ex. 510.

The difficulty of enforcing specific delivery in a Court of Law, has been considered a sufficient ground for the interposition of the Court of Equity, as in *Fells v. Read* (1796), 3 Ves. Jr. 70, 3 R. R. 47. In the notes to *Cuddee v. Rutter*, No. 62 of "Contract," 6 R. C. 644, 645, other cases will be found bearing on the subject.

It is now provided by the Rules of Supreme Court 1883, Order 48. r. 1, that the Court may order the delivery of the specific property in an action of detinue, where the property sought to be recovered is not money. The Sale of Goods Act 1893 (56 & 57 Vict. c. 71), s. 52, also provides for specific performance of contracts relating to the sale of goods. The earlier of these provisions reproduces the Common Law Procedure Act 1854 (17 & 18 Vict. c. 125), s. 78, and the latter the Mercantile Law Amendment Act 1856, (19 & 20 Vict. c. 97), s. 2. The discretion vested in the judge under the Common Law Procedure Act 1854, was liable to be reviewed, *Chilton v. Carrington* (1854), 15 C. B. 730, 24 L. J. C. P. 78 and could be exercised by a County Court Judge. *Winfield v. Boothroyd* (1886), 54 L. T. 374, 34 W. R. 501.

The property in goods sued for in detinue is not displaced until after the judgment has been satisfied. *Searth v. Searth* (Ch. App. 1874), L. R., 10 Ch. 234, 44 L. J. Bk. 29, 31 L. T. 737, 23 W. R. 153; *Ex parte Drake, In re Ware* (C. A. 1877), 5 Ch. D. 866, 46 L. J. Bk. 105, 36 L. T. 677, 25 W. R. 641.

The Statute of Limitations runs from the demand and refusal to deliver the property. *Wilkinson v. Verity* (1871), L. R., 6 C. P. 206, 40 L. J. C. P. 141, 24 L. T. 32, 19 W. R. 604; *Spackman v. Foster* (1883), 11 Q. B. D. 99, 52 L. J. Q. B. 418, 48 L. T. 670, 31 W. R. 548; *Miller v. Dell* (C. A. 1890), 1891, 1 Q. B. 468, 60 L. J. Q. B. 404, 63 L. T. 693, 39 W. R. 342.

The period of limitations is 6 years, 21 Jac. I. c. 16.

AMERICAN NOTES.

The wrongful detainer and not the original taking is the gist of the action of detinue. *Melton v. McDonald*, 2 Missouri, 45; 22 Am. Dec. 437. The manner in which the chattel came into the possession of defendant is immaterial. *Willick v. Traun*, 27 Alabama, 562.

 No. 1. — Seaman v. Dee — Rule.

The doctrine of the principal cases is declared in actions of trespass in this country. *Vosburgh v. Welch*, 11 Johnson (New York), 175; *Hammer v. Wilsey*, 17 Wendell (New York), 91.

In replevin, where the successful party has become repossessed, his damages are what it cost him to get possession; as when the sheriff wrongfully levies on and sells chattels, and the owner becomes the purchaser. *Leonard v. Maginnis*, 34 Minnesota, 506. The same is implied in *Hauselman v. Kegel*, 60 Michigan, 510. If the plaintiff has had possession during the suit he may still have damages for the taking and detention up to the time of replevin. *Fisher v. Whoolery*, 25 Pennsylvania State, 197; *Donohoe v. McAleer*, 37 Missouri, 312.

In *Morgan v. Conc*, 1 Devereux & Battle Law (Nor. Car.), 231, it was held that in detinue damages are only consequential upon the recovery of the thing sued for; and therefore if the plaintiff, pending the suit, obtains possession of it, he cannot proceed for the damages, but his suit fails altogether. "He falsifies the writ by his own act, and thereby defeats that action. It is a settled rule that wherever the plaintiff falsifies his own writ, and this appears to the Court, the writ abates." "The thing detained is all that is demanded, and the damages are awarded to render the restitution complete. In either case, if the demandant or plaintiff by his own act destroy the right to restitution, there is an end to his demand of restitution."

In the Code States the old forms of actions for recovery of specific chattels are generally abolished, and an action for "claim and delivery," or substantial replevin, is substituted, providing for the delivery of the property to the claimant on instituting the action, and for judgment for ownership and possession and damages for taking and detention.

 DEVASTAVIT.

No 1. — SEAMAN v DEE.

(K. B. 1674.)

RULE.

AN executor (or administrator) is liable at law, as for a *devastavit*, for assets wasted by his negligence.

An executor who permits an interest-bearing debt of his testator to remain unpaid, while possessed of assets sufficient to satisfy the principal, cannot set up the payment of interest, accrued since the death of the testator, against the claim of a creditor.

No. 1. — *Seaman v. Dee*, 1 Vent. 198, 199.**Seaman v. Dee.**

1 Vent. 198, 199 (s. c. 2 Lev. 40, K. B. 24 Car. II.).

Devastavit. — Assets wasted by Negligence. — Liability.

An *indebitat' assumpsit*, as executor of S., was brought [198] against the defendant by the plaintiff, as an attorney of this Court, by original.

The defendant pleads four judgments against him; one in an action of debt, (upon which the question was) for money borrowed by the testator upon interest, which debt, with the interest, at the time of the action brought, amounted to such a sum, which was recovered against him: and pleads three judgments besides, *ultra quæ* he had not to satisfy.

The plaintiff demurs, and after being divers times spoken to, the Court resolved for the plaintiff.

First, for that, as HALE said, no action of debt lies for the interest of money, tho' he which borrows it promises to pay after the rate of £6 per cent. for it; but it is to be recovered by *assumpsit* in damages. So where by deed the party covenants or binds himself to pay the principal with interest, the interest is not to be included with the principal in an action of debt, but shall be turned into damages, which the jury is to measure to what the interest amounts to, which is allowed to be done; tho' indeed the statutes (which permit the taking of interest) say, * that usury is [* 199] damned and forbidden by the law of God. And tho' it was objected, that the judgment is but erroneous, and the executor liable while reversed; and it cannot be said, it was the executor's fault to suffer it: for an executor may plead a judgment against him in debt upon a simple contract; tho' it could not have been recovered if he had pleaded to the action, or without his voluntary consent.

To that HALE said, that debt upon a simple contract lies against an executor, if he please; nay, it hath been adjudged, that an executor may retain for a debt due to him from the testator, upon a simple contract: but in this case no action lies by the law, nor any admission of the executor can make it good.

Secondly, it appears, that part of the interest accrued after the testator's death, which is the executor's proper debt, being his own default to suffer the interest to run on: then the action being brought, both for that which is due in the testator's time, and for

that which grew due since, is manifestly erroneous; and there is nothing in the defendant's plea to take away the intendment, that he had assets to satisfy at the testator's death.

ENGLISH NOTES.

There is a *dictum* of Lord HOLT, C. J., to the effect that if an administrator delays bringing an action, and the debtor is thereby enabled to set up the plea of the statute, the neglect of the administrator would amount to a *devastavit*. *Hayward v. Kinsey* (1701), 12 Mod. at p. 573. This view, however, would seem to be stricter than obtained at a later period, and the Court of Chancery would certainly have protected an executor or administrator under the circumstances, if it could be shown that the proceedings would be abortive by reason of the insolvency of the debtor. *East v. East* (1846), 5 Hare, 343. In *Pennington v. Healey* (1833), 1 Crompt. & M. 402, 1 Tyr. 319, 2 L. J. Ex. 98, an administrator sued a debtor to the estate to judgment, and under the practice then in force, took the debtor in execution under a *ca. sa.* The debtor while in gaol, petitioned to be discharged under the Insolvent Debtors' Act, and offered £150 in discharge of the debt and costs. The sum, which was not sufficient to pay the costs incurred in the action, was accepted by the administrator, and the debtor was liberated. The plaintiff, who was a creditor of the intestate, brought an action against the administrator, but a verdict passed to the defendant. PARK, J., who tried the case offered to take the opinion of the jury whether the compromise was or was not fair or reasonable, but the offer was declined by the plaintiff. A rule was subsequently obtained to set aside this verdict, but was discharged after argument. In giving judgment BAYLEY, B., said: 'The plaintiff contended, that the liberation of Jones was a *devastavit* in the defendant, and made the defendant answerable to the extent that Jones was answerable; and he cited *Brightman v. Keighley* (Cro. Eliz. 43), and *Cock v. Jenner* (Hob. 66), and several other authorities in support of that position. The case of *Brightman v. Keighley* certainly does decide that if an executor releases a debt he admits assets to the amount of such debt; and PERIAM, J., gives this reason for it 'that the law presumeth that he has received so much as he doth release.' There is a *dictum* to the same effect in Hobart — 'if an executor release, the debt released is judged assets in his hands.' There are many cases put in the books, but they are all cases in which there was an actual release, and in which it does not appear that the executor had any reason for giving the release, or that he gave it upon an honest compromise. . . . The true question is this: Does the party exercise a reasonable and honest discretion in

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making the compromise? If so, it seems to us that the executor is protected not only by going into equity, but at law. The general rule of law is that the executor is accountable for all which he has received or which, in the honest discharge of his duty, he could or might obtain."

In a Court of Equity an executor or administrator would have been required to show affirmatively that he had reasonable grounds for believing that an action on his part to enforce payment of a debt would have been fruitless. *In re Brogden, Billing v. Brogden* (C. A. 1888), 38 Ch. D. 546, 59 L. T. 650, 37 W. R. 84.

By the Trustee Act 1893 (56 & 57 Vict. c. 53), s. 21, an executor or administrator, if and so far as a contrary intention is not expressed in the instrument, if any, creating the trust, is empowered (1) to pay or allow any debt or claim on any evidence that he thinks sufficient, (2) to accept any composition or any security real or personal, for any debt or for any property, real or personal, and to allow any time for payment of any debt, and to compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust, or for any of those purposes to enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him seem expedient, without being responsible for any loss occasioned by any act or thing so done by him in good faith.

Among acts of commission which are regarded as *devastavit*s at law may be cited: The payment of an excessive sum for funeral expenses, *Hancock v. Podmore* (1830), 1 B. & Ad. 260. Paying a claim which could be resisted on the ground of illegality, *Anon. Noy.* 129; *Winchcombe v. Bishop of Winchester* (1615), Hob. 167; Brownl. & G. 33. Paying a claim which could not be enforced by reason of the Statute of Frauds, *In re Rowson, Field v. White* (C. A. 1885), No. 4, p. 342, *post.* At law too, an executor who resided at a distance from a creditor of the estate, was responsible for assets received by him, and subsequently entrusted by him to his co-executor to pay that creditor his debt, if the co-executor subsequently misappropriated the assets. *Crosse v. Smith* (1806), 7 East, 246. In a Court of Equity, however, the executor would not have been liable, as the facts in *Crosse v. Smith* are the exact case put by Lord REDESDALE in *Joy v. Campbell* (1804), 1 Sch. & Lef. 341, 9 R. R. 47. As equitable rules now prevail (Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 25 (11)) it seems that this liability has ceased in those countries to which that act applies.

Paying creditors out of the order set out in the notes to *In re Williams, Williams v. Williams*, No. 23 of "Administration," 2 R. C. 199, would be a *devastavit*. Payment of legacies before satisfy-

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ing debts is also a *devastavit*. *Knatchbull v. Fearnhead* (1837), 3 My. & Cr. 122. The executors are also protected by the provisions of 22 & 23 Viet. c. 35 (Lord St. LEONARD'S Act). The effect of this statute and the more important cases will be found in the notes to *Jervis v. Wolferstan*, No. 19 of "Administration," 2 R. C. 165-172.

At law there was no objection to an executor lending out money on personal security. *Webster v. Spencer* (1820), 3 B. & Ald. 427, 22 R. R. 427. In equity the contrary rule obtained. There, unless an executor or administrator was expressly empowered to lend money on personal security, he committed a breach of trust in adopting that form of investment. *Wilkes v. Steward* (1801), G. Cooper, 6, 14 R. R. 211. Even where an executor is authorized to lend on personal security, he is not on that account alone justified in leaving debts outstanding on personal security. *Evaus v. Flight* (1838), 2 Jur. 818.

Where an executor is entitled to lend money on personal security he may not lend to his co-executor, ——— v. *Walker* (1828), 5 Russ. 7; nor may he permit his co-executor to retain assets for his own purposes, as in the case of a business. *Booth v. Booth* (1838), 1 Beav. 125, 8 L. J. Ch. 39, 2 Jur. 938.

With the exceptions above pointed out, that which amounts to a *devastavit* may also be made the subject of proceedings in equity. The payment of an excessive sum for funeral expenses will be disallowed, but an executor or administrator may disburse a reasonable sum. *Stag v. Punter*, No. 16 of "Administration," 2 R. C. 147. Where an executor or administrator permitted debts bearing interest at 5 per cent to run on, when he had in his hands a fund to pay them, he was charged interest at that rate. *Hall v. Hallett* (1784), 1 Cox, 134, 1 R. R. 3.

An executor or administrator ought not to keep large balances in his hands uninvested. *Littlehales v. Gascoyne*, No. 20 of "Administration," 2 R. C. 172. Since the publication of Volume 2, R. C., the question of the rate of interest has been reopened by NORTH, J., in *In re Dracup*, *Field v. Dracup* (1893), 1894, 1 Ch. 59, 63 L. J. Ch. 238, 69 L. T. 858, 42 W. R. 264, and by KEKEWICH, J., in *Re Goodenough*, *Marland v. Williams* (1895), 1895, 2 Ch. 527, 65 L. J. Ch. 71, 73 L. T. 152, 44 W. R. 44. The latter decision has been followed by STIRLING, J., in an unreported case. It must now be taken that the ordinary Court rate of interest is 3 and not 4 per cent until these authorities are dissented from in the Court of Appeal or the House of Lords. Neither *In re Dracup*, *Field v. Dracup* nor *In re Goodenough*, *Marland v. Williams* otherwise affect the decision in *Littlehales v. Gascoyne*, or the principles deducible from the cases cited in the notes.

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An executor may be made liable for wilful default. The distinction between wilful default and breach of trust or *devastavit* is pointed out in a case in Ireland, *Blount v. O'Connor* (1886) 17 L. R., Ir. 620. Wilful default consists in the non-recovery of assets; *devastavit* in the waste of assets actually received. An executor or administrator may be charged on the footing of wilful default, although his omission may be unintentional or due to forgetfulness. *Elliott v. Turner* (1843), 13 Sim. 477.

A *devastavit* was a personal wrong, and accordingly the death of the person committing the wrongful act put an end to any right of action. The first change was effected by the Statute 30 Car. II., Stat. 1, c. 7. This statute was made perpetual and extended by 4 & 5 W. & M. c. 24, ss. 11 & 12. An action may now be maintained against the executor or administrator of an executor, executor *de son tort*, or administrator, for a *devastavit* committed by a person filling the latter character. Where there has been a decision or award, negating a plea of *plene administravit* by an executor, his executor or administrator is estopped by the finding. *Jewsbury v. Mammery* (Ex. Ch. 1872), L. R., 8 C. P. 56, 42 L. J. C. P. 22, 27 L. T. 618, 21 W. R. 270. An administrator *de bonis non* was held entitled to revive a suit in equity, on the ground that he was within the equity of the earlier statute. *Owen v. Curzon* (1691), 2 Vern. 237. Where a *devastavit* is shown or admitted to have been committed it is no defence that the executor of an executor has no goods of the original testator in his hands. *Coward v. Gregory* (1866), L. R., 2 C. P. 153, 36 L. J. C. P. 1, 15 L. T. 279; 15 W. R. 170.

Liability for a claim founded on a *devastavit* ceases at the expiration of six years. *In re Gale, Blake v. Gale* (1883), 22 Ch. D. 820, 48 L. T. 101, 31 W. R. 538. Where, however, the claim is not founded on a *devastavit*, the executor continues liable after the lapse of six years. *In re Hyatt, Bowles v. Hyatt* (1888), 38 Ch. D. 609, 57 L. J. Ch. 777, 59 L. T. 227. The distinction between the two classes of cases is thus expressed by CHITTY, J., in the latter case: "An executor, by virtue of his office, owes certain duties to creditors, and the duties he owes are legal duties laid down in all the ordinary books on the subject. Among these are the duties of paying the creditors before the legatees, and of paying the creditors, where there is an order of priority, according to their priorities. When an executor sued as such at common law puts in a plea of *plene administravit*, he is not allowed to set up his own *devastavit* in order to escape payment. The reason is plain. A man cannot take advantage of his own wrong, and consequently, when he is sued at common law in his character of executor, and only in that character, there must be disallowed to him all pay-

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ments which, in accordance with the duties which he owes to the creditors, have been wrongfully made, and there can be no *devastavit* found in his favour. The result is that at law the executor is considered to hold still in his hands assets which he has improperly paid away or wasted. . . . In these respects there is no difference between the liability of an executor at common law or in equity. Nor is there any difference where he is sued for a *devastavit*. If it is necessary that the demand against the executor should be framed on the principle of a *devastavit*, or if the creditor going out of his way chooses to sue him in that form, there is no question that he can plead the Statute of Limitations against the *devastavit* so charged. The reason for this is well pointed out by Sir WILLIAM PAGE WOOD in the case of *Thorne v. Kerr* (2 K. & J. 54), and appears from all the authorities upon the subject when carefully considered. The creditor in such a case elects to treat the executor as his own debtor. If the plaintiff chooses to say, it is not the estate of the debtor that is liable, but it is you, the executor, who are personally liable, the executor, being then charged with his own personal wrong-doing or tort, is entitled to avail himself of the benefit of the Statute of Limitations. In that respect the liability of an executor is the same at common law as in equity." In *Re Gale, Blake v. Gale, supra*, the charge was necessarily founded on the *devastavit*, as it was sought to charge the executor of an executor with a payment made to a simple contract creditor before making provision for a mortgage debt.

Since the decision in *In re Hyatt, Bowles v. Hyatt, supra*, the law has been modified by the Trustee Act 1888 (51 & 52 Viet. c. 59), which applies to an executor or administrator; see sect. 1. By section 8 of this statute it is enacted: "In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply: (a) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him: (b) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against

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him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession." The same section saves the right of an executor or administrator under any existing statute of limitations. These statutes are 3 & 4 Will. IV. c. 27; 3 & 4 Will. IV. c. 42; 23 & 24 Vict. c. 38; 37 & 38 Vict. c. 57. The trustee will probably not be considered to be party or privy to a breach of trust, unless he has knowledge of the wrongful act. *Thorne v. Heard* (H. L. 1895), 1895, A. C. 495, 64 L. J. Ch. 652, 73 L. T. 109. In that case first mortgagees had exercised their power of sale and had handed the balance to a solicitor who had acted for them and the mortgagor. The solicitor misappropriated the fund, and thereupon a second mortgagee of the property sought to make the first mortgagees responsible for the balance, but the claim was held to be barred. It was also held in that case that the moneys were not "still retained" by them within the meaning of the exception, as the moneys were not in their physical possession, nor under their control. In *Re Gurney, Mason v. Mercer* (1893), 1893, 1 Ch. 590, 68 L. T. 289, 44 W. R. 443, trustees advanced money on mortgage to a person who was indebted to a bank in which one of the trustees was a partner. The debt was secured to the bank by a deposit of the title deeds to the property. The amount advanced was applied in paying off a part of the debt, but without the knowledge or assent of the beneficiaries. In an action to set aside the transaction, and to follow the money as "received by the trustee and converted to his use," it was held that it was necessary to show that the conversion had been fraudulent.

If the criticism of FRY, L. J., in *Re Bowden, Andrew v. Cooper* (1890), 45 Ch. D. 444, 59 L. J. Ch. 815, is to be accepted, it seems difficult to apply clause (a) of section 8 of the Trustee Act 1888. The safest course would probably be to rely primarily on clause (b). The statute of limitations incorporated in clause (b) is 21 Jac. I. c. 61; *In re Somerset, Somerset v. Earl Poulett*, (C. A. 1893), 1894, 1 Ch. 231, 63 L. J. Ch. 41, 69 L. T. 744, 42 W. R. 145. The period would apparently commence to run from the date when the *devastavit* was committed. S. C.

Notice by a creditor of his claim in answer to an advertisement by an executor under 22 & 23 Vict. c. 35, s. 29, does not prevent the statute of limitations from running. *In re Stephens, Warburton v. Stephens* (1889), 43 Ch. D. 39, 59 L. J. Ch. 109, 61 L. T. 609.

 No. 2. — **Barry v. Rush**, 1 T. R. 691. — Rule.

AMERICAN NOTES.

The particular principle of the principal case is recognized in *Forward v. Forward*, 6 Allen (Mass.), 494.

No. 2. — **BARRY v. RUSH.**

(K. B. 1787.)

No. 3. — **ERVING c. PETERS.**

(K. B. 1790.)

RULE.

AN executor (or administrator) may be estopped, by the terms of a reference to arbitration or by admissions in his pleadings, from disputing that he has assets of the deceased in his hands to satisfy the demand of a creditor.

Barry v. Rush.

1 Term Reports, 691-692 (s. c. 1 R. R. 360).

Devastavit. — Admission of Assets. — Submission to Arbitration.

[691] Where the defendant bound himself as administrator to abide by an award to be made touching matters in dispute between his intestate and another, and the arbitrators awarded that he as administrator should pay, &c., he cannot plead *plene administravit* to debt on the bond.

Debt on bond. The plea first craved oyer of the bond (by which the defendant, as administrator, bound himself, his heirs, &c., to the plaintiff as executrix); and then of the condition which (after reciting that the plaintiff and the defendant had agreed to submit to arbitration certain disputes which had before arisen between the plaintiff and the defendant's intestate, touching certain articles of agreement between the intestate and the plaintiff's testator) was for the performance of an award to be made by arbitrators concerning the matters aforesaid, and also concerning all other matters, accounts, &c., between the said parties or either of them. It then set forth that the arbitrators had awarded that the defendant, as administrator, should pay to the plaintiff, as executrix, £298 on 27th June following, and that the parties should execute

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general releases. The defendant then pleaded that he had fully administered; and that at the time of entering into the bond, or afterwards, he had no assets, &c.

To this plea there was a general demurrer, and joinder.

Morgan was to have argued in support of the demurrer: but the Court desired the defendant's counsel to begin.

Gibbs contended that the defendant was not bound by the terms of the award to pay the money awarded absolutely, but only as administrator, out of the assets of the intestate. This appears clearly from the words of the bond; for he is there only bound as administrator, and of course is only liable to pay this debt, if the law would subject him to the payment of any other debt, in the capacity of administrator. But if there be any ambiguity in the words themselves, the Court will look to the subject-matter of the arbitration. Now the only matter referred was the difference between the plaintiff and the defendant's intestate; and the general words which follow, namely, "all other matters, &c., between the parties," must relate to the same parties in the same capacities before described. This is the only construction that can support the award; for if any other construction were to prevail, the award would be bad by comprising a subject not referred, and then the plaintiff could not have judgment. *Veale v. Warner*, 1 Saund. 326. The award of mutual releases to be given by the parties is clearly bad, inasmuch as it exceeds the power given to the arbitrator. This, then, must vitiate the whole, because nothing is then to be done by one party.

* ASHHURST, J. The Court cannot intend that anything [* 692] was ordered to be released, except the matters in dispute between the parties. We cannot intend that the arbitrator has done wrong. But laying that out of the question, there is no doubt but that this plea is bad: for the entering into the bond amounts to an admission of assets; and the defendant shall not afterwards be permitted to dispute it. The bond given by the defendant to abide by the award was an undertaking to pay whatever sum the arbitrator should award, without any regard to assets.

BULLER, J. This is a bond given by the administrator, by which he bound himself, his heirs, executors, and administrators. The question then is, whether he has bound himself personally or not? And I think there can be no doubt that he has. With regard to the releases, it must be expounded by the rest of

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the award. It will be sufficient for the defendant to give a release in the character of administrator.

Per Curiam,

Judgment for the plaintiff.

Erving v. Peters.

3 Term Reports, 685 693 (1 R. R. 794).

Devastavit. — Admission of Assets. — Admission by Pleading.

[685] If an executor plead (to an action on bond) payment, and omit to plead *plene administravit*, and a verdict be given against him on such plea, and judgment is given accordingly; the judgment operates as an admission of assets in an action, suggesting a *devastavit*.

Debt on a judgment recovered by the plaintiffs in this Court in last Trinity term against the defendant as executor of Moffatt, for £1477 10s. debt, and £95 damages, adjudged to be levied of the goods of the intestate in the defendant's hands to be administered, if he had so much, and, if not, then the £95 to be levied of the defendant's own goods. The declaration then suggested a *devastavit*: to which the defendant pleaded that he had not wasted the testator's goods, &c.; on which issue was joined. At the trial a verdict was taken for the plaintiffs for the said debt and damages, subject to the opinion of this Court on the following case:—

The plaintiffs produced in evidence the record of the judgment mentioned in the declaration, by which it appeared that they had, in Easter term, 1789, brought their action against the defendant as executor of Moffatt upon a joint and several bond, executed by Moffatt and two other persons, as his sureties, to J. Erving deceased, dated the 29th of January, 1765, conditioned for the payment of a smaller sum of money on the 29th of January, 1766. It appeared by that record that the defendant pleaded to such action that the bond was not the deed of Moffatt, together with three other separate pleas of payment at the day, and three

other separate pleas of payment after the day, by Moffatt [*686] and his sureties respectively; and that the *plaintiffs

having tendered issues upon those several pleas, and issues having been joined thereon, the same had been in due manner tried in London, and verdicts found for the plaintiffs upon all the issues; whereupon such judgment had been duly given by the Court as is mentioned in this declaration. The plaintiffs also gave in evidence upon the trial a writ of *fieri facias*, issued upon

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the said judgment on the 23d of January, returnable on the 10th of February then ensuing, commanding the sheriffs of London to cause the said debt and damages to be levied of the goods and chattels of Moffatt, in the hands of the defendant, as executor of Moffatt to be administered, if he had so much thereof in his hands to be administered; and if he had not so much, &c., then to cause the said damages to be levied of the proper goods and chattels of the defendant. The plaintiffs further gave in evidence the sheriff's return to the said writ before the commencement of the present action, whereby they certified that there were no goods or chattels in their bailiwick of Moffatt at the time of his death in the hands of the defendant, whereof they could cause to be levied the debt and damages, or any part thereof; and that the defendant had not any proper goods or chattels in their bailiwick, whereof they could cause to be levied the damages or any part thereof; and that the defendant had sold, eloiigned, and wasted divers goods and chattels, &c., of Moffatt, to the amount in value of the debt and damages. The plaintiffs gave no other evidence of a *devastavit*; and no evidence was offered on the part of the defendant. The question is, whether the evidence so given is sufficient to sustain the verdict on the part of the plaintiffs.

Marryatt, for the plaintiffs, was stopped by the Court

Wood, *contra*, admitted that it had been determined that if an executor suffered judgment by default, or judgment was given against him upon demurrer, it amounted to a confession of assets; but contended that there was no direct authority on which the rule had been extended further than those two instances, except indeed, in the case of *Ramsden v. Jackson*, 1 Atk. 292; but as that was expressly determined upon the authority of *Rock v. Leighton*, Salk. 310. *Vide* 1 Lord Ray. 589, s. c. and Lord HOLT's MS., quoted by BULLER, J. (p. 335, *post*), which was a case of judgment by default, the decision of Lord HARDWICKE will not be conclusive upon the present question. It is to be observed, too, that even in that case of *Rock v. Leighton*, an actual *devastavit* was stated. The case of *Skelton v. *Hawling*, 1 [*687] Wils. 258, was also a case of a judgment by default. If, then, those authorities do not govern or conclude the present question, it may be strongly contended upon principle that the defendant is not concluded by the sheriff's return of *devastavit*, and that the plaintiffs are not entitled to recover upon the evi-

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dence stated in the case. It was held in *Gybson v. Brook*, Cro. Eliz. 859, that the executor was not concluded by a return of *devastavit*, but that he might traverse it, otherwise he would be without remedy; and, indeed, being an *ex parte* proceeding, it would be manifestly unjust to hold him bound by it. Where an executor makes no defence at all, it may be fair to infer that he meant to collude with the plaintiff, and therefore there may be some reason to hold him bound in such a case: but where he makes a fair defence to the first action, as in the present case, it would be hard that he should be concluded. It is a strong argument, also, to show that the defendant is not necessarily liable in this second action suggesting a *devastavit*, merely because a judgment has been obtained against him in the first, that the prior judgment does not charge him in the first instance beyond the value of the assets which he has actually received, for, if it could be done indirectly, the law would permit it to be done directly. And according to the argument which the plaintiffs must urge, it would be absurd in such a case to inquire into the assets at all, as, at all events, the executor must be liable up to the extent of the debt demanded. Before the stat. of Ann. (4 An. c. 16, s. 4), it would have been highly unjust to have held an executor concluded in a case like the present; and this question must be considered in the same manner now as if it had arisen before the passing of that statute, as it does not profess to make any alteration on this subject. It must therefore be contended by the plaintiffs that before that statute an executor, being confined to one plea, could not plead to the merits without running the risk of paying the debt out of his own pocket. But the only two cases, in which a judgment *de bonis propriis* was given, were when he pleaded *ne unques executor*, or a release, which were found against him. *Bull v. Wheeler*, Cro. Jac. 648; *Bridgman v. Lightfoot*, Cro. Jac. 672. Wentw. Off. Ex. 184.

Lord KENYON, C. J. When this case¹ came before the Court they seemed to be satisfied that the plaintiffs were, in [* 688] * strictness of law, entitled to recover. It strikes me as bearing extremely hard on the defendant, but, hard as it is, he must submit to the law of the land, the current of authori-

¹ This case came before the Court on a motion for a new trial in the last term, against the defendant; but, at the request of the parties, it was turned into a special case, when the Court expressed a strong opinion

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ties being against him. I have endeavoured to make my reason coincide with those authorities, but I confess that to this moment I have met with nothing to convince my mind. It seems extraordinary that the judgment in the first action should not be a judgment *de bonis propriis*, if the executor be liable at all events: whereas the judgment is as to the debt *de bonis testatoris*, and as to the damages *de bonis testatoris, et, si non, de bonis propriis*. Now as the judgments given in the Courts of Law are the best evidence of what the law is, it should seem from this form of judgment that the executor is not liable at all events. The pleas in this case do not impute anything unjust or unconscientious to the defendant; after the bond had been given 24 years, it was not unreasonable to plead payment, and to rest on the presumption, arising from the length of time, that it had been paid. Where, indeed, an executor pleads matter which is false within his own knowledge, it is reasonable that he should suffer by it: but that is different from the present case. When a defendant pleads *plene administravit*, it must be admitted now that he is only answerable to the amount of the assets proved; and yet, in that case, he must know exactly how his accounts stood. It seems, therefore, at least as reasonable that the defendant in this case should not be liable as in that where the plea must, in many instances, be false within his own knowledge. But in such case it was held by Lord MANSFIELD in *Harrison v. Beeches*,¹ that the executor is only liable to the amount of the assets in his hands. "There to an action of *assumpsit* the defendant pleaded *non assumpsit and plene administravit*. It was insisted that if the plaintiff could prove assets unadministered to any small amount, the plaintiff must have a verdict for his whole demand. But Lord MANSFIELD said, The law was certainly understood to be so, and there are a hundred cases so determined. This struck me as absurd and wrong; I therefore consulted my brother DENISON and the other Judges, who were all of opinion that the plaintiff ought not to recover of the executor or administrator more than the assets in his hands. The plaintiff proved two notes, which amounted to £80, and took a verdict on the *non assumpsit* for the sum; and having proved £25 assets unadministered, he took a verdict on the *plene administravit* for that sum, and judgment *quando, &c.*, for the residue." I think that *decision [* 689]

¹ Cor. Lord MANSFIELD at Guildhall, June 2, 1769.

did him great honour. However, that does not govern the present case. But I find that Lord HARDWICKE, 1 Atk. 294, in determining on this very question, found himself bound by the authority of *Rock v. Leighton*, which he observed was not accurately reported in Salkeld. I cannot, therefore, set up my judgment against the opinions of Lord HOLT and Lord HARDWICKE: I yield to the weight of the authorities, but not to the reasoning of them.

ASHHURST, J., declared himself of the same opinion.

BULLER, J. The reason on which the law has directed that the judgment in the first action shall be entered against the effects of the testator is obvious, when it is considered. The action is brought for a debt due from him; and the creditor has no right to call on the administrator or executor but in respect of the effects which he has in his hands, belonging to the deceased: by law, therefore, the creditor is to be paid out of those effects; and unless it appear that there are none such, the proper judgment is that the debt shall be paid out of the effects in the hands of the executor. That is the ground of the first judgment by a creditor; and if so, it has nothing to do with any question that may arise on subsequent facts. The question then is, whether the executor by his own acts, and in what cases, may make himself liable *de bonis propriis*; on this the authorities are decisive, and I do not think that they are contrary to reason. The case before Lord MANSFIELD struck him as being singularly hard, and attended with injustice; and that noble Judge thought that he was deciding on principle against the current of authorities. It is true that there were many authorities against his decision, but the doctrine there established was not new; for in some of the precedents in Townsend's Judgments, there is the very form of judgment which was given in *Harrison v. Beeches*. That case, however, does not govern the present: here the simple question is, whether an executor or administrator, who has no effects in his hands belonging to the testator, and will not take advantage of that defence at the proper time, shall be permitted to do it afterwards. Now it is an universal principle of law that, if a party do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it either in another action founded on it, or in a *scire facias* (vide *Earl v. Hurton*, 2 Str. 732). This very question appears to have been fully and finally settled in the case of *Rock v. Leighton*. (Here Mr. J. BULLER read the following note of that case from Lord HOLT's manuscript.)

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* “ *Mary Rock* against *Leighton*, late sheriff of the [* 690] county of Salop. Action upon the case against the defendant, setting forth that Richard Pugh and others had brought an action of debt against Mary, as administratrix to her husband, Rock, upon a bond of £160, entered into by him in his lifetime, and that judgment was had against her *de bonis*, &c. ; and there-upon a *fiery facias* being taken out according to the judgment, and delivered to the sheriff, who levied £20, and for the rest returned falsely that she had wasted the goods of the intestate, and there-upon a judgment was given to have execution against her *de bonis propriis*, *ubi rererâ* she had not wasted the goods of the intestate that were of the value of the residue of the debt. Upon not-guilty pleaded, the cause came to be tried before me, the sittings after Hilary term, viz., 15th February, 12 W. III. Upon the evidence it appeared, that upon a treaty of marriage with the intestate, Richard Rock, and the plaintiff, Mary, it was agreed by articles in writing, that, in consideration of £150, which she brought as a marriage portion, Richard Rock (if she survived him) should leave her worth £300; and he covenanted with Richard Pyke, the brother of Mary, to pay the £300 to him for her use, if he departed this life before Mary. Richard Rock died; Mary took out administration, and put in an inventory that amounted to £279. In Michaelmas term, 1694, Richard Pyke commenced an action of debt against Mary for the £300, and recovered by *nihil dicit*, and execution was had upon the goods by a bill of sale upon a *fiery facias* issued in Easter term following at the suit of the executor of Pyke, who had recovered the judgment. In Hilary term, 1694, Pugh, &c., commenced their action in the Common Pleas against the plaintiff, Mary Rock, as administratrix to her husband, Richard Rock, and she let judgment go by default, and had no assets above the £279 mentioned in the inventory. I was of opinion that, by letting judgment go by default when she might have pleaded the judgment with *riens inter mains ultra* to satisfy that judgment, which would have been a good bar, she had tacitly admitted that she had assets *ultra*, and was concluded by such her omission; for which purpose I cited the case of *Kilborn* and *Rack*, adjudged in B. R. Hil., 1657. A judgment in debt was had against tenant in tail, who died; and *scire facias* being issued against the heir and terre-tenants, the defendant, Rock, was returned heir and terre-tenant, and that he was sum-

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[* 691] moved: upon his not appearing, * judgment of award of execution was given against him, and a moiety of the lands were extended by *elegit*. And ejectment being brought thereupon, it was specially found that the lands of the defendant in the judgment were entailed, and that the defendant in the ejectment was heir in tail; but in regard he might have pleaded that matter to the *scire facias*, and had omitted it, he had lost the benefit thereof. So the plaintiff, Mary, might have pleaded the judgment at her brother's suit; that would have defended the assets that she had against the action brought by Pugh: but she, having admitted the assets, she had to be liable to the action of Pugh by letting judgment go against her by *nihil dicit*, is in the same condition as if there had been no judgment against her at her brother's suit upon the covenant for £300. And the sheriff hath done her no wrong; for if upon an inquiry the jury had found the *devastavit* in the plaintiff, the plaintiff upon traversing the inquisition could not have given this judgment in evidence to defend herself, because she might have pleaded it in bar of the action. This case I (having heard in my chamber, because of the consequence of it) directed should be moved in Court, which, accordingly, was done; and both my Brothers, TURTON and GOULD, concurred with me in opinion; and so the verdict that was given for the plaintiff by consent, to be subject to the opinion of the Court, was set aside. If debt be brought against an executor, and he lets judgment go by *nihil dicit* or confession, it seems to be an admission of assets. For first, the want of assets is a good bar to the action that the plaintiff hath brought; and if issue be joined thereupon and found for the defendant, the plaintiff is forever barred. Hob. 199, *Brickhead v. Archbishop of York*, 1 Cro. 373. Now there is the same reason that since the defendant waives pleading the matter that would have barred the plaintiff, he thereby admits the having assets. It's true that when the defendant pleads a *plene administravit* the plaintiff may admit the plea to be true, and pray judgment *de bonis et cattallis* of the testator, *et quæ ad manus of the executor in futuro devenirent administrandæ*. *Mary Shipley's Case*, 8 Co. Rep.; *Neal v. Nelson*, 2 Saund. 226. But that is a different judgment from what is given upon a *nihil dicit*, or a confession of the action; for that is the same as is given upon a *plene administravit* pleaded where there is a verdict for the plaintiff, viz., to recover *de bonis testatoris*

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si tantum in manibus habuit administrand', from which none can infer that, if he hath fully administered before, he is not affected by the judgment: but it is to be considered that though it be found * upon a *plene administravit* that the defendant [* 692] hath assets, yet is the judgment the same, and so ought to be; for if the defendant hath assets in his hands there is no reason to levy the money upon the executor's own goods unless he hath wasted; and, that being matter of fact, it must appear upon record, and judgment must be given thereupon before his own goods can be affected. But if a *fieri facias de bonis testatoris* doth issue upon a judgment had against the executor upon a *plene administravit* pleaded, if the goods cannot be found that were the testator's, namely, if the executor will not expose them to the execution, the sheriff may return a *devastavit*, it being found by verdict that he had assets. Now, then, since the pleading of *riens inter mains* would have been a good bar to the action (and if the plaintiff should admit it he should not have a judgment to have a present execution), yet the defendant by not pleading that plea hath left the plaintiff to have a judgment upon which a present execution is to issue, which he could not have had, unless the defendant had assets; and such an admission is as good as a finding of a jury upon a *plene administravit*. Secondly, The case of an executor doth not in this case differ from that of an heir; for if the heir let judgment go by *nihil dicit* or confession, he admits assets. It is true the judgment is different; for an heir is chargeable upon the account of the assets which he hath in his own right, and the executor is chargeable in respect of assets that he hath in the right of the testator: but still the admission of assets is as much by a *nihil dicit* or confession in one case as in the other. The like if an heir plead *non est factum*, or conditions performed, a general judgment shall be given, if the matter pleaded be found against him. So in the case of an executor, if the matter pleaded be found against him, he admits assets; for if he hath none, why doth he plead that matter; it will be enough to deny assets, and that will bar the plaintiff. Objection, *Bird v. Culmer*, Hob. 178. Debt against an executor who pleaded *plene administravit*, and afterwards *relictâ verificatione cognovit actionem*. It was moved that it might be entered that he confessed assets. It was denied, because the confession can be only to the charge, which is the action; from whence it is inferred that the confes-

sion of the action is not a confession of assets. Answer. Rather the contrary is to be inferred, namely, that *plene administravit* and a *cognovit actionem* are inconsistent; for he cannot confess the action without a *relictâ verificatione* of the *plene administravit*; so he must relinquish one to confess the other; for the one is [* 693] a *bar, but the other confesses all things requisite to maintain the plaintiff's action. And as to the caution of the Court, it was no more but to confine itself to the order and method of the law, which is to make a proper entry, namely, to confess the whole action. Then followed the case of *Ramsden v. Jackson*, where Lord HARDWICKE thought himself bound by the authority of *Rock v. Leighton* on the very question; and the opinion of Lord Ch. J. LEE, in the case in *Wilson*, is to the same effect. Then there are three cases, all determining the same point. And if an executor may plead *plene administravit* and neglect to do so, I see no difference between such a case and one where he does so plead, and the plea is found against him.

GROSE, J. This case must be considered in a different point of view now from what it must have been prior to the statute of Anne: before the passing of that act the executor must either have denied the debt and admitted assets, or he must have admitted the debt and pleaded *plene administravit*; the consequence of which was, that if only part of the debt were due, he must have paid the whole by his own admission. But since that statute he may plead both as to the debt and *plene administravit*: but if he will not avail himself of the advantage given to him by that act, and he will only deny the debt, the case of *Rock v. Leighton* shows that he admits assets. The authorities of Lord Ch. J. HOLT, Lord Ch. J. LEE, and Lord HARDWICKE are peculiarly strong, and conclude this question.

Postea to the plaintiffs.

ENGLISH NOTES.

From the judgment of BULLER, J., in *Pearson v. Henry* (1792), 5 T. R. 6, 2 R. R. 523, it would seem that the question of acts amounting to an admission of assets was first raised about 1773.

A promise by an administrator to pay the debts of an intestate, is a *nudum pactum* if there be no assets. *Pearson v. Henry, supra*. So too the liability upon an implied promise of executors for funeral expenses incurred by a third person, by reason of the neglect of the executors to provide for the burial of the testator, depends upon the sufficiency of the assets. *Tugwell v. Heyman* (1812), 3 Camp. 298, 13

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R. R. 810; *Rogers v. Price* (1829), 2 Y. & J. 28; *Corner v. Shaw* (1838), 2 M. & W. 350, 7 L. J. (N. S.) Ex. 105. But an executor may render himself personally liable. *Brice v. Wilson* (1834), 8 Ad. & El. 349 n. (c.), 3 Nev. & M. 512, 3 L. J. (N. S.) K. B. 93.

An executor who permits judgment to go by default, will be taken to have admitted assets. *Skelton v. Howling* (1749), 1 Wils. 258; *Re Higgin's Trust* (1861), 2 Giff. 562, 30 L. J. Ch. 405, 7 Jur. N. S. 403. In an administration action in which the executor was defendant, he was served with notice of motion to pay into Court moneys shown by an affidavit to have been received by him. The defendant did not appear, nor did he file any evidence. This was taken to be a sufficient admission that the money was in his hands, and he was ordered to pay the same into Court. *Freeman v. Cox* (1878), 8 Ch. D. 148, 47 L. J. Ch. 560, 26 W. R. 689. This decision is not to be extended: *Neville v. Matthewman* (C. A. 1894), 1894, 3 Ch. 345, 63 L. J. Ch. 734, 71 L. T. 282, 42 W. R. 675. In *Payne v. Tanner* (1886), 55 L. J. Ch. 611, 55 L. T. 258, 34 W. R. 714, an executor was fixed with liability on the footing of an admission of assets from a letter and payment of interest to a tenant for life. An admission that a debt is just and should be paid as soon as the executor could, is not sufficient to charge him with assets; *Hindsley v. Russell* (1810), 12 East, 232, 11 R. R. 373. Payment of interest on a legacy is *prima facie* evidence of assets; *Parey v. Huddleton* (1854), 18 Jur. 992. So too payment of interest commencing six years after the testator's death and continuing for seven years was held an admission sufficient to charge the executor personally, on the ground that he had ample time to ascertain the state of the assets before he made the first payment of interest. *Attorney General v. Chapman* (1840), 3 Beav. 255, 10 L. J. Ch. 90.

A *devastavit* can only be committed at law in respect of assets actually received; see *Blount v. O'Connor* and other cases cited in notes to *Seaman v. Dee*, No. 1, p. 321, *ante*. An executor cannot in general be charged as upon an admission of assets, for moneys appearing in the accounts filed for revenue purposes. *Stearn v. Mills* (1832), 4 B. & Ad. 657, 1 Nev. & M. 436, 2 L. J. (N. S.) K. B. 106. But if items mentioned in that account are shown to have been received, the burden of proof is shifted upon the executor, who has then to discharge himself from the assets. *Young v. Cawdrey* (1819), 8 Taunt. 734, 8 Moore, 66, 21 R. R. 523.

In *Foster v. Blakelock* (1826), 5 B. & C. 328, 8 Dowl. & Ry. 48, 4 L. J. (O. S.), K. B. 170, the probate stamp was regarded as *prima facie* proof of assets covered by the duty, but that case was criticised in *Stearn v. Mills*, *supra*, and is dissented from by Lord WENSLEYDALE, who was then a Justice of the King's Bench. The injustice of the

decision in *Foster v. Blakelock* is pointed out by LITTLEDALE, J., in *Stearn v. Mills*, in that the Stamp Act then in force required payment of duty on the whole estate, without deducting anything on account of the debts due from the deceased. It is doubtful whether *Foster v. Blakelock* can be regarded as an authority for more than this, that, coupled with other circumstances, it may form a link in the chain of evidence to prove an admission of assets, *Mann v. Lang* (1835), 3 Ad. & El. 699, 5 Nev. & M. 202, 4 L. J. (N. S.) K. B. 210; *Lazonby v. Rawson* (1854), 4 De G. M. & G. 556, 24 L. J. Ch. 482, 1 Jur. N. S. 289; *Hutton v. Rossiter* (1854, 1855), 7 De G. M. & G. 9, 24 L. J. Ch. 106. Under the Finance Act 1894 (57 & 58 Vict. c. 30), duty is paid in respect of moneys which the executors are not entitled to receive, ss. 2 & 4.

By the Statute of Frauds (29 Car. II. c. 3), s. 4, it is provided: "No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person. . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized." The question whether this section applies is to be determined by considering whether the undertaking of the executor is a primary obligation or merely collateral; *Birkmyr v. Darnell* (1705), Salk. 27, 1 Smith Lead. Cas. Thus upon a liability for rent accrued in the lifetime of the deceased the judgment would be *de bonis testatoris*, but for use and occupation by his representative the judgment would be *de bonis propriis*: *Wigley v. Ashton* (1819), 3 B. & Ald. 101, 22 R. R. 316. The liability of an executor for rent accruing in his own time may be thus summarized. If the executor be sued in his representative capacity whether the demise be by deed or parol, he is only liable if the land yields a profit or he has assets. Whatever profits the land yields must be applied in discharge of the rent as far as it is sufficient for that purpose. *Dean & Chapter of Bristol v. Guyse*, 1 Wms. Saund. 126, note (c); *Rubery v. Sterens* (1832), 4 B. & Ad. 241, 1 Nev. & M. 282, 2 L. J. (N. S.) K. B. 46. The liability of the executor to this extent exists although it is not shown that he has entered. *Bolton v. Caubham* (1676), Pollexf. 125, 1 Vent. 271. An administrator of an original lessee continues liable after assignment. *Coghill v. Free-love* (1690), 2 Vent. 209. Where the executor is sued in respect of his occupation, whether the original demise be by deed or parol, the executor is only liable to the extent of the value of the land, and the residue of the landlord's demand must be against the assets of the deceased;

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Remnant v. Bremridge (1818), 8 Taunt. 191, 2 Moore, 94, 19 R. R. 495; *Wollaston v. Hakewill* (1841), 3 Man. & Gr. 297, 3 Scott N. R. 593, 10 L. J. C. P. 303. But the executor is liable *de bonis propriis* to the extent of the value of the land. *Rubery v. Sterens, supra*.

Where an executor is chargeable as on an admission of assets, his personal representative is estopped in an action brought under 30 Car. II. Stat. 1, c. 7, and 4 & 5 W. & M. c. 24 (which made liable the executor or administrator of an executor or administrator who had wasted the assets of the original testator or intestate, from showing that his testator or intestate had no assets of the original testator or intestate. *Jewsbury v. Mummery* (Ex. Ch. 1872), L. R., 8 C. P. 56, 42 L. J. C. P. 22, 27 L. T. 618, 21 W. R. 270. As execution against an executor or administrator who has committed a *devastavit*, is *de bonis testatoris, et si non de bonis propriis*, an executor sued under these statutes cannot meet the action by showing that he has no assets of the original testator in his hands. *Coward v. Gregory* (1866), L. R., 2 C. P. 153, 36 L. J. C. P. 1, 15 L. T. 279, 15 W. R. 170.

AMERICAN NOTES.

Both principal cases are cited by Redfield on Wills, but with no analogous American cases. The first is cited by Morse on Awards, p. 21, who examines the English decisions, and says: "Questions of this nature seem to have been of rare occurrence in the United States, perhaps because statutory provisions have generally interfered to protect the executor or administrator." In *McKeen v. Oliphant*, 3 Harrison (New Jersey Law), 442, the executor was held not personally bound by a submission on behalf of himself and his heirs, the award to be paid "out of the estate of said deceased." The Court said, "the strict technical rule" that submission was an admission of assets could not prevail over the clear intention of the parties expressed in the submission; and Mr. Morse adds, that "unquestionably the old rule must be regarded as not only strict and technical, but as too antiquated to be now regarded as law by any tribunal." In *Tallman v. Tallman*, 5 Cushing (Mass.), 325, the doctrine of the Rule was *obiter* recognized, without citing any authorities. The common-law rule was recognized in Kentucky in *Overly's Ex'r v. Overly's Devises*, 1 Metcalfe, 117; *Farborough v. Leggett*, 11 Texas, 677 (citing *Barry v. Rush*), but held to be not in force in submissions under statute; and so in Pennsylvania. *Konigmacher v. Kammet*, 1 Penrose & Watts, 207; 21 Am. Dec. 374, where the Court said: "I have said the old cases are unreasonable and are not law now." "The old cases at law, as to the liability of executors, guardians, etc., are of such a nature as to excite astonishment. They would seem, by consent, to have been set up like a cock at Shrovetide, to be thrown at by all who delight in such sport;" and as to the rule in question, "It has not been the law for two centuries."

In *Wood v. Tunnickliff*, 74 New York, 46, the Court said, citing *Barry v. Rush*, that "The authorities tend to establish that executors are personally bound by a covenant to abide by and perform an award contained in a sub-

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mission entered into by them, although in form they covenanted as executors, unless from the other parts of the submission it appears that the intention was to bind themselves only to pay out of the assets in due course of administration." This doctrine is approved in *Sumner v. Williams*, 8 Massachusetts, 162, 5 Am. Dec. 83 (a case of a deed), citing *Barry v. Rush*, and remarking: "In short, the general principle undoubtedly is, I think, that an administrator has no power of charging the effects in his hands to be administered, by any contract originating with himself." The existence of the common-law rule is also recognized in *Kendall v. Bates*, 35 Maine, 357; *Alling v. Munson*, 2 Connecticut, 691; *Childs v. Uptlyke*, 9 Ohio State, 333; *Barker v. Belknap's Estate*, 39 Vermont, 168.

If the award is less than would have been recoverable by suit, the executor is liable for the deficiency. *Bean v. Farnam*, 6 Pickering (Mass.), 269; *Wheatley v. Martin's Adm'r*, 6 Leigh (Penn.), 62; *Nelson's Adm'r v. Cornwell*, 11 Grattan (Virginia), 724. Mr. Morse however queries whether this doctrine would apply in cases of submission by statutory authority.

No 4. — IN RE ROWNSON: FIELD v. WHITE.

(C. A. 1885.)

RULE.

AN executor or administrator, although not bound to take advantage of a Statute of Limitations which only bars the remedy, commits a *devastavit* if he pays a claim arising under an agreement which could not be enforced by reason of the Statute of Frauds. And he cannot retain, as for a debt due to himself, under a claim which by reason of the Statute of Frauds, he could not have enforced.

In re Rownson: Field v. White.

29 Ch. D. 358 365 (s. c. 54 L. J. Ch. 950; 52 L. T. 825; 33 W. R. 604).

Devastavit. — Claim which cannot be enforced. — Statute of Frauds.

[358] An executor or administrator would commit a *devastavit* who paid a debt to a creditor who is prevented from enforcing it by the Statute of Frauds. And for the same reason an executor or administrator cannot retain such debt if due to himself.

A father in consideration of the marriage of his daughter made a verbal promise to pay his daughter and her husband £500. He died intestate without performing his promise, and the daughter took out administration to his estate: —

Held (affirming the decision of KAY, J.), that the administratrix could not retain the debt out of the assets.

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The question in this case arose in the administration of the estate of Joseph Rownson.

On the 23rd of September, 1847, Thomas White married Marion, the daughter of Joseph Rownson, and Thomas White and his wife alleged that upon the treaty for the marriage Rownson verbally promised and agreed in consideration of the intended marriage to pay them the sum of £500. They also stated that after the marriage Rownson admitted the promise to White, and gave him two bills of exchange drawn by the firm of Rownson & Drew upon the Maesteg Iron Company, which was being wound up in bankruptcy, but that nothing had been received on the bills.

Rownson died in August, 1870, intestate, and letters of administration of his estate were granted to Marion White. She now claimed to retain the sum of £500, together with £472 for interest, out of Rownson's assets.

When the cause came on for further consideration Mr. Justice KAY held that the promise to pay £500 was within the 4th section of the Statute of Frauds (29 Car. II. c. 3), and could not be enforced, and that the delivery of the bills of exchange did not amount to a part performance, and refused the claim for a right of retainer.

* From this decision the defendants, Mr. and Mrs. [* 359] White, appealed.

W. Pearson, Q. C., and Oswald, for the appellants: —

The fact of the promise by the intestate is proved by the evidence of Mr. White, and is sufficiently corroborated by the evidence of his wife. *In re Finch*, 23 Ch. D. 267. Mr. Justice KAY did not decide against us on this point, but he held that the promise was within the 4th section of the Statute of Frauds, and could not be enforced. We contend that this was an erroneous view of the law. The statute does not make the contract void, but only bars the remedy. *Britain v. Rossiter*, 11 Q. B. D. 123, 48 L. J. Q. B. 362. It is similar to a debt which is barred by the Statute of Limitations. And it has been well established that an executor or administrator may pay a debt which is barred by the Statute of Limitations if due to a stranger, or may retain it if due to himself. Williams on Executors, 8th ed., pp. 1053, 1810; *Norton v. Frecker*, 1 Atk. 524; *Sharman v. Rudd*, 4 Jur. N. S. 527, 27 L. J. Ch. 844; *Stahlschmidt v. Lett*, 1 Sm. & Giff. 415; *Hill v. Walker*, 4 K. & J. 166; *Coombs v. Coombs*, L. R., 1 P. & M. 288, 36 L. J. P. & M. 25; *Prince v. Rowson*, 1 Mod. 208.

[BOWEN, L. J., referred to *Shallcross v. Wright*, 12 Beav. 558, 19 L. J. Ch. 443.]

There is no direct authority in our favour with respect to a debt barred by the Statute of Frauds, but there is no authority against us, and there is no difference in principle between such a debt and one barred by the Statute of Limitations. The debt is a good one *in foro conscientie*, and an executor would not be committing a *devastavit* in paying it. We also rely on the delivery of the bills of exchange to White as a part performance of the parol promise.

Hastings, Q. C., and F. C. Norton, for the plaintiffs, who were next of kin of the intestate : —

There is no sufficient evidence of the verbal promise by the intestate. The oath of Mr. White is not sufficient in itself, and his wife's testimony is no corroboration. *Manning v. Purcell*, 7 D. M. & G. 55; *In re Finch*. The delivery of the bills [* 360] to White could not amount * to part performance. They were overdue bills which were practically worthless, and had no connection with the alleged promise. But whatever proof there is of the verbal promise it is within the 4th section of the Statute of Frauds, and could not be enforced. If it had been due to a stranger, the administratrix would have committed a *devastavit* in paying it, and for the same reason she could not retain it herself. It is admitted that there is no authority for the claim of the administratrix, but it is contended that the debt is analogous to a debt barred by the Statute of Limitations. But the right of an executor to pay or retain a debt barred by the Statute of Limitations is an exception to the general rule and ought not to be extended. An executor may not pay a debt which was incurred *pro turpi causa* : *Wickham v. Bishop of Winchester*, Hobart, 167, *Robinson v. Gier*, 1 Ves. Sen. 251; or for gaming : *Manning v. Purcell*, 7 D. M. & G. 55. In the case of a debt barred by the Statute of Limitations there is originally a good debt which may be enforced, and the Courts have been reluctant to prevent the executor from paying such a debt. In the present case there never was a debt which could be enforced. *Shewen v. Vanderhorst*, 2 Russ. & My. 75; *Burke v. Jones*, 2 V. & B. 275 (13 R. R. 83).

[BOWEN, L. J., referred to *Lavery v. Turley*, 30 L. J. Ex. 49.]

It is the duty of the executor or administrator to protect the estate of the deceased against claims which cannot be enforced. He is not to determine what debts are equitable and what are

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not. Here the administratrix is claiming to be judge in her own cause.

Oswald, in reply.

March 24. COTTON, L. J.:—

This was an appeal of the defendant, who was the administratrix of the intestate in the case, from an order made by Mr. Justice KAY.

The administratrix claimed a sum of £500, and interest to a certain date, and she claimed to retain it on this ground, that previous to her marriage her father, the intestate, had promised her husband to give her £500 as her portion in consideration of *the marriage, and that the promise had never [*361] been in any way satisfied; and, therefore, after the death of the intestate, she, having taken out administration, claimed to retain the £500 and interest.

I assume, for the purpose of my judgment, that there was evidence which would establish as a fact that such an agreement was made. I assume that only for the purpose of my judgment, for the promise was made a very great number of years ago, and the evidence as to what then took place, and as to what subsequently took place, is not very satisfactory, and would require a very great deal of examination if we had to determine the fact whether such an agreement was made or not.

Now, this is an agreement which is subject to the restrictions of the 4th section of the Statute of Frauds. That section provides that after the date therein mentioned no actions shall be brought to charge a debt upon any agreement made upon consideration of marriage unless it is evidenced by writing. Here, there was no writing at all; there was a mere parol agreement, and no action could be maintained upon that. Can the administratrix retain in respect of such an agreement? The duty of the administratrix is undoubtedly to get all the personal estate she can, and not to pay any claims made against the estate unless they are those which may properly be paid. If she pays unnecessarily then she is guilty of a *devastavit*. The right of retainer originated in this way. It is stated in Mr. Justice Williams' book on Executors, and, I think, accurately stated, that as any creditor could sue an administrator or executor, and could get priority by means of a judgment on his claim, if one enforceable at law, except as against any creditors of superior degree, it was unreasonable that an

administrator who, by taking out administration, became unable to sue himself, should lose the possibility of obtaining priority, and therefore he was allowed, if he had a claim, to retain. But no action could be maintained on such a promise as is alleged in this case, although it is clear that under the section of the statute the promise is not made void, for it is only enacted that no action can be maintained upon it. It is difficult to see how an executor or administrator can retain a debt on which, if vested in another person, no action could be maintained. But it has been [* 362] held that *an executor or administrator can retain a debt,

although it is barred by the Statute of Limitations, and it is said if an executor or administrator may retain a debt against which there is a good defence under the Statute of Limitations, why should he not retain a debt where there is nothing which makes the contract void, but the statute only prevents an action being brought upon it, just as the Statute of Limitations, if pleaded, would prevent an action being successfully brought? It has been held that an executor or administrator is not bound as against a creditor who has a claim that is barred by the Statute of Limitations to plead the statute. If he thinks fit he may pay a debt, although it were proved that the Statute of Limitations would afford a good defence, but it has never been held that an executor is at liberty to pay a claim under a contract which is by parol and within the 4th section of the Statute of Frauds. It is said that if we follow logically the analogy of cases on the Statute of Limitations we ought to come to the conclusion that as an administrator or an executor may retain a claim barred by the Statute of Limitations, so he may one on which, under the 4th section of the Statute of Frauds, no action could be brought. If we were to hold that the liberty given to an administrator or executor not to plead the Statute of Limitations, and, consequently, the right to retain a statute-barred claim which he himself possessed, was really an instance of a general principle, it would follow that in this case there ought also to be a right of retainer. But in my opinion we ought not to come to such a conclusion. It is quite uncertain what the origin was of allowing an executor to pay a debt against which he had a good defence under the Statute of Limitations, it being the duty of an executor or administrator not to pay claims he is not bound to pay; that is, he is not unnecessarily to diminish the estate which comes to his

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hands by paying a claim to which he has a defence. We know that there are some people, both Judges and other persons, who think that to plead the Statute of Limitations is unconscionable, and in my opinion we must look upon that liberty which has been conceded to an executor not to plead the Statute of Limitations, or, if he has a statute-barred claim of his own, to retain it, not as a principle applicable to other similar cases, but as an exception from the general rule, admitted on the ground * of [* 363] the dislike which is entertained by many people to the plea of the Statute of Limitations.

In my opinion, as there is no case where such liberty has been given except where the Statute of Limitations would be the defence, we ought not to extend the liberty to other cases, but to consider the liberty allowed as to statute-barred debts as an exceptional instance in which executors are allowed to depart from what otherwise would be their duty. I certainly am not inclined to extend it to other cases where there is a defence to a claim of a similar nature to that under the Statute of Limitations, namely, one which does not destroy the claim but only prevents an action being successfully brought in respect of it.

In my opinion, therefore, without going into the evidence, the administratrix was not entitled to retain this amount of £500 and interest. I think the appeal must fail on this point.

BOWEN, L. J. :—

I am of the same opinion. The duty of executors or administrators is, after paying the funeral expenses and collecting the assets, to pay the just debts and to satisfy just claims against a testator's estate. But it is clearly his duty not to waste an estate not his own, which he is administering for the benefit of others, in satisfying demands that are equally untenable in law and in equity.

However, it has been said that there is an exception to this duty with respect to claims barred by the Statute of Limitations. Since the time, at all events, of Lord HARDWICKE, it has been said, with a passing dissent on the part of an eminent common-law Judge in *M'Culloch v. Daves*, 9 Dow. & Ry. 40, 43, and now it is established law, both in Courts of Equity and Law, that no executor is compellable to take advantage of the Statute of Limitations against debts otherwise justly owing.

We have been asked to extend that qualification of the general

rule to the case of a contract or agreement which is void, or rather which cannot be enforced as falling within the 4th section of the

Statute of Frauds. It seems to me that although we are [*364] bound by * a current of authority with regard to the Statute of Limitations we should not be justified in extending that exception further than the authorities have gone. There is to my mind this difference also between a case under the Statute of Limitations and a case under the 4th section of the Statute of Frauds. The Statute of Limitations does not destroy the debt but only the remedy, and it has been held that an executor may waive that defence in the case of a debt which existed and which appears to be well founded. But a parol contract within the Statute of Frauds, though not void to all intents and purposes, but capable of being dealt with for certain purposes as a valid agreement, is incapable, nevertheless, of being enforced in an action either directly or indirectly. And if you have a contract which is not capable of being enforced either at law or in equity, I fail to see that a contract of that sort creates a debt or liability against the estate of a testator.

It seems to me it would be going further than the cases have yet gone to say that a debt which the executors can recognise is created against a testator's estate when there is only a parol agreement invalidated by the 4th section of the Statute of Frauds. If the executor would not be justified in satisfying such a claim preferred by others it seems to me to follow on the principle on which the doctrine of retainer is founded that the executor could not retain for his own benefit.

FRY, L. J. :—

The right of the administratrix to retain in this case appears to me to depend upon the question whether or not it is a *devastavit* in an executor to pay a debt which by reason of the provisions of the 4th section of the Statute of Frauds could not be enforced.

Now the general rule with regard to the duty of an executor has been laid down long ago. It is stated in Comyns' Digest that it is a *devastavit* if an executor or an administrator pay that which need not be paid. That I conceive to be the general rule of law on the point, but on that general rule an exception has undoubtedly been grafted in the case of a debt not enforceable by reason of the Statute of Limitations. It has been long established that an executor is not bound to plead that statute, and that he is not guilty of a *devastavit* if he do not plead it.

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* Is that an exception that should not be extended, or [* 365] is it an illustration of some such general principle as this : that an executor may, at the expense of the estate, pay a debt due on an oral contract, but which debt is incapable of being enforced either at law or in equity ? Now, if it be an illustration of a general principle of that sort we should certainly find other illustrations of it, but although there must be, as it seems to me, many cases of debts due on existing contracts which would have been paid but for their being incapable of being enforced at law, no other case can be found, so far as the diligence of counsel or the investigations by the Bench can discover, as to a general right in an executor to pay anything more than he is bound to pay. That appears to me very cogent evidence to show that the case of the Statute of Limitations is an anomaly, — a single exception, and is not to be extended. No case has been found upon the Statute of Frauds, though a number of cases must have occurred in the hundreds or thousands of estates administered under the Court of Chancery.

I think, therefore, that this attempt to extend the exception fails, and we must hold that to pay a debt which is not enforceable by reason of the Statute of Frauds would be a *devastavit*, and, consequently, that the administratrix has no right to retain.

ENGLISH NOTES.

A short view of the extent of the right of retainer, and an enumeration of the persons who are entitled to exercise the right, will be found in the notes to *Warner v. Wainsford*, No. 17 of "Administration," 2 R. C. 150, 151.

In the principal case the right of retainer is rested upon this, that an executor or administrator could not sue himself, and was accorded this right as a set-off. It has however, also been rested on the right of an executor to prefer creditors in equal degree. Whichever view is the correct one, the right can only be exercised under the circumstances mentioned in the rule.

The right could not be exercised against the right of a creditor in higher degree to the executor or administrator. *Re Jones, Culver v. Luxton* (1885), 31 Ch. D. 440, 55 L. J. Ch. 350. Where it has been declared by a Court of competent jurisdiction, in proceedings in which the plea is properly raised, that a debt is barred by the Statute of Limitations, an executor would commit a *devastavit* if he subsequently paid the debt. *Midgley v. Midgley* (C. A. 1893), 1893. 3 Ch. 282, 62 L. J. Ch. 905, 62 L. T. 241, 41 W. R. 659.

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A beneficiary can insist that the personal representative shall set up the statute, where proceedings have resulted in an administration judgment. *Re Wenham, Hunt v. Wenham* (1892), 1892, 3 Ch. 59, 61 L. J. Ch. 565, 67 L. T. 648, 40 W. R. 636. So too after a decree for administration a Court of Equity would have restrained a creditor from proceeding at law, where the assets were ascertained. *Parton v. Douglas* (1803), 8 Ves. 520; *Gilpin v. Lady Southampton* (1812), 18 Ves. 469. It might have been thought that the right of retainer was lost under similar circumstances. This, however, was not the case, as appears from the cases cited in the Notes to *Warner v. Wainsford*, No. 17 of "Administration," 2 R. C. 150, 151. It may be that the Court considered that the executor had as great an equity as the other creditors, and that he should be entitled to assert his legal right, or that he must be taken to have asserted his right from the date when the proceedings were instituted. Before a decree, the Court of Chancery did not interpose. *Rush v. Higgs* (1799), 4 Ves. 638.

AMERICAN NOTES.

Mr. Schouler (Executors and Administrators, sect. 392), correctly observes: "While the bar of limitations may thus be disregarded, in the case of demands once binding, an executor or administrator exercises no such option as to debts or claims which never had a binding force, since the law invests him with no authority on the decedent's behalf to dispense favors or perform obligations simply moral. Hence he cannot pay a debt that accrued under a contract that is void because within the Statute of Frauds; and if he does so, he is chargeable with *devastavit*: though the promise may be said to create a personal liability on his part." Citing *Baker v. Fuller*, 69 Maine, 152, which sustains his text.

But in *Berry v. Graddy*, 1 Metcalfe (Kentucky), 553, it was held that the administrator might retain for his own debt although it was within the Statute of Frauds, because it arose on a contract, not to be performed within a year, but had been performed on his part. This is put on the ground that the statute only cuts off the remedy on the contract by action. The Court rely on *Roberts v. Tennell*, 3 T. B. Monroe (Kentucky), 247, where the landlord's right of distress was held to exist although he could not have maintained an action on the oral contract of letting. "The Statute of Frauds does not affect the common-law right of retainer by an administrator."

No. 1. — *Elliot v. Wilson*, 4 B. P. C. 470. — Rule.

DEVIATION (IN CONTRACTS OF INSURANCE).

See also No. 4 of "Carrier," 5 R. C. 273 *et seq.*No 1. — *ELLIOT v. WILSON*.

(H. L. 1776.)

No. 2. — *HARE v. TRAVIS*.

(K. B. 1827.)

RULE.

A WILFUL deviation from the due course of an insured voyage is a determination of the insurance; and it is immaterial from what cause or at what place the subsequent loss arises, — the insurers being in no case answerable for it.

But the deviation, even although intended at the commencement of the voyage, does not vitiate the policy *ab initio*; and the insurer is liable for a loss incurred in the course of the voyage before actual deviation.

Elliot v. Wilson.

4 Brown's P. C. 470-476.

Insurance. — Deviation. — Avoidance of Policy.

A wilful deviation from the due course of an insured voyage is in all [470] cases a determination of the policy; from that moment the contract between the insurers and insured is at an end; and it is totally immaterial from what cause or at what place the subsequent loss arises, the insurers being in no case answerable for it.

The harbour of Carron, situate near the head of the Frith of Forth, is chiefly resorted to by ships in the service of the Carron Company, who have a great iron work and considerable collieries in the neighbourhood. From thence vessels, intended principally to convey the manufactures of the company, their coal and such

goods as may be offered them on freight, sail periodically for Hull, and other places on the eastern coast of England. This is a coasting or carrying trade, the vessels in going down the Frith touching at different places to take in additional loading, or to discharge part of what they have received at places higher in the river. Particularly, it is usual for these vessels to call at Borrowstoness and Leith, and at Morrison's Haven, a port six miles further down the Frith, and on the same side with Leith, in the bay of Prestonpans.

In February, 1774, the respondents had occasion to ship fourteen hogsheads of tobacco on board one of these vessels for Hull, and desiring to insure them, gave the following instructions in writing to Hamilton and Bogle, insurance brokers in Glasgow:

"Please to insure for our account by the *Kingston*, George [* 471] Finley, master, * from Carron to Hull, with liberty to call, as usual, fourteen hogsheads of tobacco;" and these instructions were entered in the broker's books for the perusal of the underwriters, as is the practice at Glasgow.

Upon the 9th of February, the appellants underwrote a policy of insurance in these terms: "Beginning the adventure of the said tobacco, at and from the loading thereof on board said *Kingston*, at Carron wharf, and to continue and endure until said *Kingston* (being allowed a liberty to call at Leith) shall arrive at Hull, and there be safely delivered."

The respondents were not privy to the allowance to call at Leith being thus substituted in the policy for the more general term, as usual, mentioned in their instructions to the broker. The premium agreed on was £1 5s. per cent, a rate equal, at least, if not higher than was in use to be given on the voyage, in cases where it was understood or expressed in the policy that the vessel might touch at the customary ports. And in particular, some of these appellants, in February, 1772, underwrote a policy upon this very vessel, and for the same voyage, with liberty to call at Leith and Morrison's Haven, at a premium of £1 per cent only.

The vessel thus insured had sailed from Carron five days before the date of the policy, that is, on the 4th of February, 1774; it did not call or touch at Leith, but put into Morrison's Haven; set sail from thence on the 9th; got safe into the direct course from Carron to Hull; cleared the Frith of Forth, and proceeded with a

fair wind, till, on the evening of the 10th, the vessel, being overtaken by a storm at Holy Island, on the coast of Northumberland, was wrecked, and the cargo totally lost. All these were facts admitted; nor was it alleged by the appellants that the ship received the smallest damage in going into or coming out of Morrison's Haven.

Intelligence of this misfortune reached Glasgow on the 14th of February, when the respondents for the first time saw the policy of insurance, or understood that it differed in terms from their instructions to the broker in whose hands it remained. It did not, however, occur to them that this slight variation would afford a handle to the underwriters for refusing payment; nor does it seem to have then occurred to these gentlemen, who immediately wrote to the respondents, desiring they would request the Carron Company to give the necessary orders for preserving the tobacco, and forwarding it to Hull, promising to contribute towards the expense so far as they were interested.

After this seeming acquiescence, the respondents were not a little surprised, when, upon the 24th of February, a protest was taken against them by all the underwriters in person, attended by a notary public and witnesses; in the instrument which they caused the notary to draw up and sign on that occasion they were pleased to give the following account of the matter: "Upon Wednesday, the 9th of February current, a policy was offered to *the said James Coulter, Alexander Elliot, [*472] Robert Carrick, Andrew Dunlop, and Henry Ritchie, in the office of Archibald and Gilbert Hamilton, insurance brokers in Glasgow, for their underwriting as insurers on goods, for account of the said William Wilson and Company, on board the ship *Kingston*, Captain Finley, from Carron shore to Hull, with liberty to touch as usual. Upon requiring the broker to explain what he meant, by touching as usual, he said he meant a liberty to stop at Leith Road or Harbour for a short time, in case any passengers or goods were expected from that place; and upon inquiring the advices about the time of sailing, he said that he was informed the vessel had sailed the Saturday before, being the 6th of February current. In these circumstances, the said James Coulter and the other persons aforesaid were satisfied with the conditions of the voyage, and signed the policy, which contains a liberty to touch at Leith, and nowhere else; and as the wind and weather

were favourable from the Sunday to the Wednesday, they had good reason to conclude the vessel would make a safe and speedy passage to Hull. But being now well informed that, instead of prosecuting the voyage described in the policy, the said ship *Kingston* was designedly carried into the port of Morrison's Haven near Prestonpans, where she staid four or five days, having really sailed on Friday, the 4th current, taking in a large quantity of a very dangerous commodity, viz., sulphur; and from which port of Morrison's Haven she did not depart till the 9th of the month, and was the next day wrecked near Holy Island on her way to Hull; which misfortune was entirely owing to her stay in that harbour, whereby she lost many days of the most favourable winds and weather, which would have completed her voyage in safety, in place of meeting with a change of wind and storm of snow, which occasioned her shipwreck; and the said underwriters would not have underwritten upon the said policy if they had known the vessel had been to call at Morrison's Haven, and take in an additional cargo; wherefore the said James Coulter, Alexander Elliot, Robert Carrick, and Andrew Dunlop, for themselves, and as procurators for the said Henry Ritchie, did and do protest, that this plain deviation, contrary to the express stipulation in the policy, must, according to the constant practice of merchants, render the policy null and void; and therefore they hold themselves to have no further concern in the goods insured."

The respondents having brought an action upon the policy against the appellants, and the appellants having put in defences setting up a deviation by putting into Morrison's Haven under the circumstances above mentioned, the Judge Admiral pronounced a judgment to the effect that the facts stated did not avoid the insurance.

The appellants brought this judgment under review of the Judge, and ultimately of the full Court of Session in Scotland, by proceedings which in effect raised the abstract question, whether the vessel touching at Morrison's Haven, when not allowed by the policy, discharged the underwriters? The Judge Admiral adhered to his original judgment, and this was affirmed by the Court.

[474] The present appeal was then brought; and on behalf of the appellants it was contended, that a wilful deviation from the due course of an insured voyage is in all cases a deter-

mination of the policy; from that moment the engagement between the insurers and insured is at an end; and it is immaterial from what cause, or at what place, a subsequent loss arises, the insurers being in no case answerable for it. The going into Morrison's Haven was a wilful deviation from the due course of a voyage from Carron to Hull; and though it may be true, as contended on the part of the respondents, that ships sailing through the Frith of Forth, have sometimes been permitted by the terms of a policy underwritten at the same premium as the present, to go into this port, it would not avail them in the present case, since this policy gave no such permission. The respondents appeared by their instructions to their broker to have been aware, that the going without permission into any port but that of their destination, would be a deviation; and the broker, finding it difficult to get a policy underwritten on any other terms, thought fit to restrain the liberty of calling to the port of Leith. But independent of what passed between the broker and the underwriters before their signing this policy, it was submitted that a policy, penned like the present, giving liberty to call at one port, excluded every claim to a liberty of calling at any other.

On behalf of the respondents it was said, that what the appellants called a deviation in this case could not have the effect of vacating the policy, there being neither an increase nor a difference of risk; for the voyage, as actually made, was one and the same chance with that insured against, even taking the policy in the strict sense contended for. The appellants, indeed, to give a colour to their plea, by the appearance of a different risk, argued that the loss was occasioned by going into Morrison's Haven; for had there been no interruption of the course from Carron to Hull, the vessel would have escaped the storm which overtook it at Holy Island. But as the vessel was allowed to call at Leith, without any limitation of the time of staying there, the risk of the voyage being prolonged by calling at a port in the course of it, was clearly undertaken by the insurers; and it made no difference of hazard, whether that port was Leith or Morrison's Haven; policies of insurance are to be construed largely, and for the insured; a rigid adherence to literal terms has been deservedly reprobated in Courts of Law, and among merchants. Every voluntary deviation from the direct line has not the effect to discharge the underwriters, it *being sufficient if the [* 475]

voyage is according to usage. But the appellants' argument went even farther than literal interpretation, for they would construe "liberty to call at Leith," as a direct prohibition to call anywhere else; though the just and more natural conclusion was, that had such prohibition been intended, it would have been expressed; and as it was not disputed, that vessels in the trade from Carron to Hull usually touch at Morrison's Haven, and that this consisted with the knowledge of the appellants, the voyage, as made, was according to usage, and within the intent of the policy. The appellants were not at liberty to deviate from the respondents' instructions shown to them, but ought either to have kept to the precise terms of those instructions, or not have signed the policy at all; especially when they were told that the vessel had previously sailed. If their plea now was not affected, their conduct then was insidious and wrong; and as, by their silence, the respondent was led to believe himself secure in all events, they were in equity obliged to make good his loss.

Like most other questions arising from insurance, the present fell to be judged upon equitable principles, resulting from the special circumstances of the case: and when all circumstances here were considered, the plea of the appellants must be deemed an attempt to evade payment, equally illiberal and ineffectual. An express allowance to call at one port being given, the vessel passed it and touched at another, only six miles farther down the river, and in the course of the voyage insured. The alleged deviation was singly the act of entering Morrison's Haven; for the vessel's sailing close by it never could have been so termed, so near was it to the direct course of the voyage; and nothing being more common than to tack from one shore to the other in going down the Frith; calling at Leith, or at Morrison's Haven, was but the difference of a name, for the time of staying at the port mentioned in the policy was not limited. The risk was not greater, as it is allowed by every person acquainted with the coast, that Morrison's Haven is even a safer and more accessible harbour than Leith; and, in fact, no damage was sustained by the deviation, the vessel having regained the direct course to Hull, and being wrecked after proceeding in it several leagues. But, further, the words in the policy, whatever the appellants now affected to understand by them, seemed to have been used as synonymous with those in the respondents' instructions to the

No. 2. — *Hare v. Travis*, 7 Barn. & Cress. 14.

broker. The appellants admitted having seen the instructions and asked the broker what was meant by calling as usual. The words inserted in their place could not be intended to limit the more general term, because the insured were neither masters of the vessel, nor had any direction or knowledge of the precise course of the voyage; and because it was understood by all the parties concerned, that the vessel had sailed from Carron three days at least before making the insurance, and consequently might be in some other port at that instant, as it actually was; a circumstance which it was not impossible for the underwriters to be acquainted with. It was evident, therefore, *that the [*476] broker could not possibly mean to make the policy void, in case the vessel had called, or might call, at the other usual places besides Leith; and if the appellants tacitly entertained such an idea, having the instructions before their eyes, being acquainted that the vessel had already sailed, knowing the usage, and taking the accustomed premium, they were guilty of a fraud, from which they could not be allowed to reap any advantage.

But after hearing counsel on this appeal it was ordered and adjudged that the interlocutors complained of should be reversed; and it was declared that the respondents were entitled to a return of the premium paid by them to the appellants; and it was therefore ordered and adjudged that the appellants should pay or cause to be paid to the respondents the said premium.

Lords' Journals, 25 Nov. 1776. Vol. XXXV., p. 25.

Hare v. Travis.

7 Barn. & Cress. 14-18 (s. c. 9 Dowl. & Ry. 748).

Insurance. — Deviation. — Intention not carried out.

A policy, in the usual form, was effected on pearl ashes on a voyage at [14] and from Liverpool to London. The captain took in goods at Liverpool for Southampton as well as London, intending to go first to the former place. He accordingly went into Southampton, and delivered the goods shipped for that place, and afterwards proceeded to London. The termini of the voyage being the same as those described in the policy, it was held to be the same voyage until the vessel reached the dividing point, and that the policy attached although putting into Southampton was a deviation.

The goods insured received considerable damage from sea-water. But they were not examined at Southampton, nor until they reached London, when the

No. 2. — *Hare v. Travis*, 7 Barn. & Cress. 14, 15.

damage was found to amount to 60 per cent. Before the vessel reached the dividing point of the two voyages she had met with bad weather, and had made much water, and on one occasion, the water pumped up appeared to hold the pearl ashes in solution. On the voyage from Southampton to London there were no heavy seas, and the weather was tolerably fair. Under these circumstances, it was held, that it was a question for the jury, whether the pearl ashes had sustained damage to the limit stipulated by the policy, before the deviation; and they having found that they had sustained damage to that amount, the Court refused to disturb the verdict.

This was an action on a policy of insurance on pearl ashes on board the ship *Smgrua*, on a voyage at, and from Liverpool to London. The policy contained the usual clause, that all goods were to be free from average under three per cent, unless general, or the ship were stranded. At the trial before Lord TEXTERDEN, C. J., at the London sittings after last term, it appeared that the captain had taken in goods at Liverpool for Southampton as well as London; the vessel, on the 23d of September, sailed from Liverpool, having on board the pearl ashes, which were stowed in the lower tier; she was compelled by bad weather to put twice into Holyhead, and upon a survey had there, it appeared she made much water. On the 30th of October the *Smgrua* left Holyhead, and from that time the hold of the ship was never free from water; while she was in the Bristol Channel, the water pumped up took the colour out of the captain's clothes, which he attributed to its having the pearl ashes in solution. On the 1st of November the vessel arrived at Southampton, and the captain there delivered the goods shipped for that place, but the pearl ashes were not unloaded or examined there. The vessel left Southampton [* 15] *on the 4th of November, and arrived in London on the 10th. On her voyage from Southampton there were no heavy seas. The weather was tolerably fair, but the ship made water, although not so much as she had previously done.

The pearl ashes, on their arrival in London, appeared to have sustained so much damage by salt water as to be depreciated in value upwards of 60 per cent. They were in a state of solution, and it was proved by persons conversant with the article, that that could not have happened, from coming in contact with salt water, in less time than three or four weeks, certainly not in three or four days. Upon this evidence it was contended, that the plaintiff ought to be nonsuited, inasmuch as the vessel did not sail from Liverpool on the voyage insured, viz., a voyage to London,

No. 2. — *Hare v. Travis*, 7 Barn. & Cress. 15-17.

but on a voyage to Southampton. That was the first port of destination; for the captain, having taken in goods for Southampton, must have cleared out for that place. That was the voyage contemplated and performed. Secondly, assuming that the putting into Southampton was a mere deviation, there was no evidence of the amount of the damage caused by the perils of the sea before the deviation took place. Lord TENTERDEN, C. J., was of opinion that the vessel did sail on the voyage insured, the captain having an intention to deviate, which intention was afterwards executed by his going into Southampton, and that the underwriters, therefore, were not liable for any damage which occurred after that period: therefore, it was a question for the jury upon the evidence, whether, before the vessel put into Southampton, the assured had sustained damage to the amount of three per cent by a peril of the sea? *The jury found that the damage [* 16] done to the pearl ashes before the deviation exceeded three per cent.

Campbell now moved to enter a nonsuit, on the ground that the vessel did not sail on the voyage insured, for the captain intended, in the first instance, to go to Southampton. In all the cases on the subject, a total loss has happened before the vessel reached the dividing point, and there is no case where underwriters have been held liable after a deviation. Secondly, the underwriters were clearly discharged from all responsibility after the deviation. The pearl ashes were not examined at Southampton, and all goods being warranted free from average under three per cent, it was incumbent on the plaintiff to show distinctly that before the vessel deviated by going into Southampton, the pearl ashes had been injured to that amount by a peril of the sea. But there having been no examination of the cargo at Southampton, that became impossible. *Parkin v. Tunno*, 11 East, 22, 2 Camp. 59 (10 R. R. 422), is an authority to show there must be distinct evidence that the goods were damaged to that amount while they were protected by the policy, and that the evidence in this case was not sufficient for that purpose. From the 1st to the 10th of November the vessel was on her voyage from Southampton, and was frequently pumped. The damage may have occurred during that period.

Lord TENTERDEN, C. J. It appeared at the trial that the captain took in goods for Southampton, and also for London. Having loaded his vessel with goods partly *for one [* 17]

place and partly for the other, I thought it was to be inferred that he sailed on a voyage to both places, and that so long as the vessel continued in that course, which was common to a voyage either to Southampton or London, she was sailing on the voyage insured. But as the policy did not contain any clause giving liberty to the vessel to put into Southampton, I thought the putting into that port was a deviation, and that the underwriters were not responsible for any loss which accrued subsequently. It appeared, however, that the vessel met with very bad weather in the early part of her voyage; that she put into Holyhead, and that after she left Holyhead, and before her arrival at the dividing point of the voyage, when the water was pumped up, it changed the colour of the captain's clothes; and it appeared further, that in the voyage from Southampton to London the weather was fair. When she arrived in London it was found that the pearl ashes had sustained damage to the amount of two-thirds of their value. Under these circumstances, I left it to the jury to say, whether, before the vessel came to the dividing point, Southampton, the assured had sustained a loss by the perils of the sea amounting to three per cent? The jury found that they had; and I think there was evidence to support that finding.

BAYLEY, J. Where the insurance is on a voyage to a given place, and the captain when he sails does not mean to go to that place at all, he never sails on the voyage insured. But where the ultimate termini of the intended voyage are the same as those

described in the policy, although an intermediate voyage be [*18] contemplated, the voyage is to be considered the same* until

the vessel arrives at the dividing point of the two voyages. The departure from the course of the voyage insured then becomes a deviation; but before the arrival at the dividing point, there is no more than an intention to deviate, which, if not carried into effect, will not vitiate the policy. In *Kewley v. Ryan*, 2 H. Bl. 343 (3 R. R. 408), the policy was at and from Grenada to Liverpool. The ship sailed for Liverpool; but the captain, before the commencement of the voyage, had formed a design to touch at Cork on her way. She was totally lost before she arrived at the dividing point; but the termini of the intended voyage being really the same as those described in the policy, the Court held that it must be considered the same voyage; and that a design to deviate, not effected, would not determine the policy; and they

observed that the ship was bound for Liverpool, although she had also clearances for Cork. That case, therefore, is an authority to show, that until the captain in this case departed from his course towards London, the voyage may be considered as a voyage to London. Upon the other point, I agree with my Lord, that under the peculiar circumstances of this case there was evidence to go to the jury that a loss to the amount of 3 per cent had been sustained before the deviation, and that no fault is to be found with their verdict.

HOLROYD and LITLEDALE, JJ., concurred.

Rule refused.

ENGLISH NOTES.

The former of the principal cases is a decision of the highest authority on the pure point of law, or, as it was put in the proceedings for review mentioned on p. 354, *supra*, "on the abstract question, whether the vessel touching at Morrison's Haven, when not allowed by the policy, discharged the underwriters." And the decision is clearly independent of any suggestion that the risk was materially enhanced. The report does not make it clear why the premium was ordered to be returned. Probably it was on the ground that the policy was effected (on the 9th Feby.) by the insured in good faith and in ignorance of the fact of the deviation which had then already determined the risk. This would be consistent with *Oom v. Bruce* (1810), 12 East. 225. 11 R. R. 367, and not inconsistent with *Tait v. Levi* (1811), 14 East. 481. 13 R. R. 289, where the deviation appears to have been subsequent. It is to be remembered that deviation only discharges a policy from the time of deviation (*Green v. Young*, 1701. Salk. 444), so that according to the terms of the contract the risk has attached and the premium is earned, unless there is some equity to set aside the contract altogether.

The case of *Clason v. Simmonds*, No. 5. p. 384, *post*, is an illustration of the former branch of the rule.

It is of no consequence how short the deviation is. An armed vessel bound with convoy from Cork to Jamaica cruised for a night in concert with two other armed merchant vessels in hopes of meeting with a prize. This was held by a special jury of merchants under directions of Lord CAMDEN to discharge the underwriters. *Cock v. Townson*, C. B., cited in *Park on Insurance*, Vol. 2, p. 630.

Two other early cases stated in *Park on Insurance*, Vol. 2, p. 620, may be here quoted: In *For v. Black* (Exeter Assizes, 1767, before Mr. Justice YATES), the plaintiff was a shipper of goods in a vessel bound from Dartmouth to Liverpool; the ship sailed from Dartmouth and put into Loo, a place she must of necessity pass by in the course of the

insured voyage. But as she had no liberty given her by the policy to go into Loo, and although no accident befel her going into or coming out of Loo (for she was lost after she got out to sea again), yet Mr. Justice YATES held that this was a deviation, and a verdict was accordingly found for the underwriter. In *Townson v. Guyon* before Lord MANSFIELD, an action was brought on a policy on goods loaded on board the *Charming Nancy* from Dunkirk to Leghorn. The ship came to Dover on her way to procure a Mediterranean pass and was afterwards lost. Lord MANSFIELD was of opinion that the calling at Dover was a deviation, and the plaintiff was nonsuited.

“It is not material, to constitute a deviation, that the risk should be increased.” *Per* Lord MANSFIELD, in *Hartley v. Buggin*, No. 7, p. 391, *post* (3 Douglas, 39).

Nor is it less a wilful deviation, if the captain has deviated through ignorance, or some motive not fraudulent, and therefore not coming within the definition of barratry which is one of the risks insured against in the common form of policy. *Phyn v. Royal Exchange Assurance Co.* (1798), 7 T. R. 505, 4 R. R. 508.

In *Redman v. London* (or *Londou*), 1813, 1814, 3 Camp. 503, 5 Taunt. 462, 1 Marsh. 136, it was held that a deviation from the voyage described in the policy was fatal to any claim on it, although the deviation took place before the policy was entered into, and at the time of effecting the policy the underwriter was shown a letter from the captain of the ship at sea which showed that the deviation had taken place. GIBBS, C. J., said (5 Taunt. 464): “Since the parties have made the policy in its present form of an insurance on a voyage at and from London to Berbice, the legal requisites of a voyage at and from London to Berbice must be performed in this case, as in any other. It is a sad objection, and the Court would help the plaintiff if they possibly could.” It does not appear whether the premium was returned, but it may be assumed that it was or might have been, since, having regard to the facts known to the parties, the contract, according to the construction given to it by the Court, was impossible or insensible.

On the latter branch of the rule, an earlier express authority is *The Hussion v. Fergusson* (1780), 1 Dougl. 360. An insured ship bound for Havre was captured when steering towards Brest. In an action on the policy a verdict was found for the plaintiff. There was some evidence of an intention to go to Brest, but the captain swore that the course in which he was taken was the safest way, in time of war, of getting to Havre, which still continued to be the place of the ship's destination. The Court refused a new trial. Lord MANSFIELD said: “The voyage to Brest was, at most, an intended deviation not carried

into effect." The other Judges, WILLES, J., ASHHURST, J., and BULLER, J., concurred.

Another example is the case of *Heselton v. Allnutt* (1813), 1 M. & S. 46. A ship insured on a voyage to Memel, with liberty to touch, &c., sailed for Gottenburgh (which is on the route to Memel) with orders to inquire there whether to proceed to Memel or to Anholt. She was captured on the way to Gottenburgh. Lord ELLENBOROUGH, C. J., said: "I think there was an inception of the voyage insured. The preponderating intent of the assured was to go to Memel, although that intent was liable to be changed according to circumstances. . . . I think that there may be a good inception of the voyage under a fluctuating purpose."

See also *per* Lord MANSFIELD, in *Woolbridge v. Boydell*, and *Kewley v. Ryan*, both cited in notes to Nos. 3 & 4, pp. 380, 381, *post*.

AMERICAN NOTES.

Any voluntary deviation is a change of the risk; it forms a departure from the contract, and an attempt to substitute another. It is not necessary that the risk should thereby be increased; it is sufficient that it be changed. Its effect is to discharge the underwriters. *Natchez Ins. Co. v. Stanton*, 2 Smedes & Marshall (Mississippi), 310; 41 Am. Dec. 592. To the same effect: *Maryland Ins. Co. v. LeRoy*, 7 Cranch (U. S. Supr. Ct.), 30; *Gazzam v. Ohio Ins. Co.*, 1 Wright (Ohio), 202; *Coffin v. Newburyport M. Ins. Co.*, 9 Massachusetts, 449; *Stewart v. Tennessee, &c. Ins. Co.*, 1 Humphreys (Tennessee), 242; *Schieffelin v. New York Ins. Co.*, 9 Johnson (New York), 21; *Riggin v. Patapsco Ins. Co.*, 7 Harris & Johnson (Maryland), 279; 16 Am. Dec. 302; *Hood v. Nesbit*, 2 Dallas (Penn.), 137; 1 Am. Dec. 265; *Burgess v. Equitable M. Ins. Co.*, 126 Massachusetts, 70; 30 Am. Rep. 654; *Fernandez v. Great W. Ins. Co.*, 48 New York, 571; 8 Am. Rep. 571 (trial trip); *Hearne v. Marine Ins. Co.*, 20 Wallace (U. S. Supr. Ct.), 488; *California Nav. Co. v. State Investment, &c. Ins. Co.*, 70 California, 586; *Auldenreid v. Mercantile M. Ins. Co.*, 60 New York, 482; 19 Am. Rep. 204 (deviation to repair a defect known at sailing); *Snyder v. Atlantic M. Ins. Co.*, 95 New York, 196; 47 Am. Rep. 29; *Burgess v. Equit. M. Ins. Co.*, 126 Massachusetts, 70; 30 Am. Rep. 654 (fishing boat putting in for bait).

In the *Snyder* case, above, the insurance was "at and from Bermuda to New York," to sail in July. On July 2, the vessel left her berth and steamed twenty miles to Hamilton, took a schooner in tow to St. Georges, thence to sea five miles, then returned to her berth; on July 3, receiving clearance papers, she towed another schooner to sea, thence sailed to Hamilton, took on coal and a life-boat, and thence sailed, July 4th, for New York, and was lost on the route. Held, a fatal deviation. Citing *Brown v. Tayleur*, 4 Ad. & Ell. 241; *Kettell v. Wiggin*, 13 Massachusetts, 68. "It seems to us that when the *Ackerman* left St. Georges her 'voyage risk' clearly commenced, and her subsequent employment in towing the *Hound* to sea not only increased

the perils, but subjected the insurers to liabilities which they had not contracted for."

In *Wilkins v. Tobacco Ins. Co.*, 30 Ohio State, 317; 27 Am. Rep. 455, the policy permitted navigation of the Ohio and Mississippi Rivers below Cairo, and contained no prohibition of other navigation; the boat made a trip outside those waters and returned safely, but was afterwards destroyed by fire not caused nor contributed to by that departure. Held, that the only effect of the deviation was to relieve the insurer from liability for any loss happening outside the permitted waters, and that after a temporary departure and return in safety to the permitted waters, the insurers are liable for a subsequent loss not caused nor contributed to by such deviation. In *Greenleaf v. St. Louis Ins. Co.*, 37 Missouri, 25, there was a like decision, where there was a time policy, permitting navigation of certain waters and excepting others, and there was a trip on excepted waters and a safe return and a subsequent loss by fire.

In *Wheeler v. New York M. Ins. Co.*, 35 New York Superior, 247, the policy contained a warranty "not to use foreign ports and places in the Gulf of Mexico." The vessel cleared for a port in the Gulf of Mexico, and went aground on the coast of Cuba, seven hundred miles distant. Held, not a breach of the warranty; that the mere intention to use did not constitute a use. This was founded on *Snow v. Columbian Ins. Co.*, 48 New York, 624; 8 Am. Rep. 578, holding that a warranty not to use a certain port means not to go into it, and that a mere intention to use a prohibited port does not violate the policy. The Court said: "It is the act or fact by which the result is determined. A man may determine to violate his contract or to defraud his neighbour a thousand times and in a thousand ways, and yet not place himself within the reach of the law. He may perform his contract when he intends to violate it. If his acts are right, a secret intent cannot injure him; nor if his acts are wrong can a good intent save him."

The same was adjudged by the United States Supreme Court, in *Marine Ins. Co. v. Tucker*, 3 Cranch, 357, a case of capture before reaching the dividing point. "An intent to do an act can never amount to the commission of the act itself. That an intended deviation will not vitiate a policy, and that the vessel remains covered by her insurance until she reaches the point of divergency, and actually turns off from the due course of the voyage insured, is a doctrine well understood among mercantile men, and has uniformly governed the decisions of the British Courts from the case of *Foster & Wilmer* to the present time."

The same doctrine is also explicitly declared in *Henshaw v. Marine Ins. Co.*, 2 Caines' Rep. (New York) 274; *Hobart v. Norton*, 8 Pickering (Mass.), 159; *Winter v. Delaware M. Ins. Co.*, 30 Pennsylvania State, 334, and may be pronounced as uniformly held in this country.

No. 3. — *Raine v. Bell*, 9 East, 195. — Rule.

No. 3. — *RAINE v. BELL*.

(K. B. 1808.)

No. 4. — *HAMMOND v. REID*.

(K. B. 1820.)

RULE.

WHERE a ship insured with liberty to call and stay at an intermediate port, calls and stays there for a necessary purpose of the voyage; and, while there, an act is done unconnected with the purpose of the voyage, but without prolonging the stay at this port or varying the risk, that is not a deviation determining the policy.

But where a ship, insured on a voyage from A. to B. with liberty to discharge and take on board cargo at C., having shipped a full cargo for B. calls at C. for a purpose wholly unconnected with the voyage, it is a deviation.

Raine v. Bell.

9 East, 195-203 (9 R. R. 533).

Insurance. — Deviation. — Liberty to call and stay.

It is not an implied condition in a common marine policy on ship and [195] freight that the ship shall not trade in the course of her voyage, if that may be done without deviation or delay or otherwise increasing the risk of the insurers, and therefore where a ship was compelled in the course of her voyage to enter a port for the purpose of obtaining a necessary stock of provisions, which she could not obtain before in the usual course by reason of a scarcity at her lading ports, and, during her justifiable stay in the port so entered for that purpose, she took on board bullion there on freight which the jury found did not occasion any delay in the voyage; it was held not to avoid the policy.

This was an action on a policy of insurance "on the ship *Rio Nova*, and freight, from her loading port or ports on the coast of Spain to London, with liberty to touch and stay at any port or place whatever, without being deemed a deviation." The plaintiff declared on a loss by the perils of the sea. It appeared in evidence at the trial at Guildhall, that by the long continuance of the voyage from port to port in Spain, and the difficulty of obtain-

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ing provisions on the coast at that time, the ship's provisions had run very short, and she was obliged to put into Gibraltar to lay in a sufficient stock before her departure for London. But it also appeared, that while the ship lay at Gibraltar for that purpose the captain received on board some chests of dollars on freight: and some question was at first attempted to be made whether the true object of going there was not to take on board these dollars; but the weight of the evidence was against this supposition: and finally Lord ELLENBOROUGH, C. J., left it to the jury to say whether the going into Gibraltar were of necessity in order to obtain a proper stock of provisions; and if so, whether the stay there were longer than was necessary for that purpose; telling them that in either case the policy would be avoided. The jury, however, affirmed the necessity of the ship's touching and stay at Gibraltar in order to lay in her provisions: and the loss of the ship being proved to have happened by the perils of the sea off the coast of Cornwall in her homeward-bound voyage, they found a verdict for the plaintiff for the amount of the defendant's insurance.

[* 196] But a question of * law was raised, whether the taking in the additional cargo of dollars at Gibraltar, which was said to be a breaking bulk in the course of the voyage at a place where there was no liberty to trade, did not avoid the policy; as increasing or having a tendency to increase the risk of the underwriters beyond the terms of the policy: and this it was contended by the defendant to do, on the authority of Lord KENYON in *Stitt v. Wardell*¹ and of Lord ELLENBOROUGH in *Sheriff v. Potts*.² And in order to discuss this point, a rule *nisi* was obtained in the last Term for setting aside the verdict, and for a new trial; against which the Attorney-General, Park, and Dampier, now showed cause, and denied the application of the cases cited to the present, as well as the reasoning on which they were said to be founded. The question of deviation by going into Gibraltar is wholly removed by the finding of the jury, justifying the necessity of it. The only principle on which the breaking of bulk, properly so called, in the course of the voyage insured, that is, the unshipping of any part of the original cargo for the purpose of trading, can be deemed to avoid the policy, is on account of the delay thereby

¹ Tried at the Sittings after Michaelmas Term, 38 Geo. III., at Guildhall, 2 Esp. Ni. Pri. Cas. 609 and Park on Insur.

² Sittings after Michaelmas Term, 44 Geo. III., 5 Esp. Ni. Pri. Cas. 96

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occasioned, which increases the risk of the underwriters, unless a liberty to stay and trade at the particular place be stipulated for. But that cannot apply to a case where the whole stay of the ship was covered by a justifiable necessity; and where not even the disposition of any part of the original cargo could be altered by taking in a few chests into the cabin. In the case of *Stitt v. Wardell* there was *an actual breaking of bulk in [*197] the course of the voyage: for the ship having been driven by stress of weather into Dublin harbour, she continued there no less than three weeks, and during that time unloaded part of her cargo of coals and sold them. It does not appear by the report of the case, that the necessity which first brought the vessel into Dublin continued during the whole three weeks; nor is it probable that it should, as it does not appear that she was under repair during the time: and Lord KENYON's opinion turned upon the liberty to touch at any port not extending to a liberty of trading there. Besides, that was a case of the first impression; and can only be supported on the principle of the act done operating to increase the underwriter's risk; for there is nothing in the terms of the policy itself which prohibits even the unloading a part of the cargo, or the taking in other goods: such acts are only prohibited by implication, as they may occasion delay in the prosecution of the voyage insured: and if no delay be in fact occasioned, it seems difficult to say how the mere act of unloading part of a ship's cargo can increase the risk of the underwriters on the ship. [In answer to a question from the Court, they disclaimed any right to cover the freight of the dollars so taken in at Gibraltar: only contending that the taking them in did not avoid the policy on the ship or the freight of the original cargo insured.] The case of *Sheriff v. Potts* was ruled on the authority of the former case; with this additional circumstance, which was relied on by Lord ELLENBOROUGH, that there was a special liberty reserved "to touch and discharge goods at Lisbon" in the course of the voyage from Guernsey to Gibraltar; which was considered to be a virtual exclusion of the liberty of taking in a new cargo at Lisbon. They also reasoned by analogy from the *case of hypothecation. [*198] Where a ship is driven into a foreign port by distress, and is obliged to repair, not only is it warrantable to unship the whole cargo for the purpose of the repair; but as the captain may hypothecate the cargo, Case of the *Gratitude*, 3 C. Rob. Adm.

Rep. 240, as well as the ship for the expense of the repair, so he may unload and sell a part of the cargo for that express purpose.

Garrow and Marryat, *contra* : —

It is no answer to the objection that the policy does not expressly prohibit any alteration of the cargo in the course of the voyage by unloading part or taking in other goods, or, as it is commonly and technically called, the breaking bulk; which includes goods stowed in the cabin as well as under the hatches. There are many implied stipulations in favour of the underwriters; such as that a ship shall be properly documented; that she shall be seaworthy; and have a sufficient complement of men and stock of provisions, &c. One of these is, that she shall not trade in the course of the voyage: and there is no distinction in this respect between a greater and less degree of trading; between unloading or taking in a single bale or package, or a hundred: any partial alteration of the cargo in the course of the voyage may affect the whole: it may or it may not in a particular instance occasion delay in the prosecution of the voyage: that will depend upon a variety of minute circumstances and considerations, which it is usually impossible for an underwriter to trace; but any degree of trading has a necessary tendency to create delay; it holds out a continual temptation to deviate from and delay the voyage: and it is on account of this necessary tendency, and the difficulty of [*199] discriminating how much delay is to be attributed to necessity and how much to the trading, that the policy of the law raises an implied engagement in the assured that the ship shall not trade at all in the course of the voyage, unless permission to do so be expressly reserved; and the very reservation of such express permission in certain cases shows the understanding of the mercantile world that it is prohibited in all others. The cases of *Stitt v. Wardell* and *Sheriff v. Potts* have judicially established the implied prohibition against breaking bulk or trading in the course of the voyage: and it is better for all parties to abide by the plain broad rule of an entire prohibition, than to introduce a dubious question into every case, how far the trading tended to delay.

[LAWRENCE, J., observed, that the facts reported in *Stitt v. Wardell* did not support the reason said to be given by Lord KENYON for avoiding the policy, namely, that the holding the underwriters liable would be to make them insure a voyage not

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in their contemplation; for there was no deviation in that case from the course of the voyage; but the ship was forced by stress of weather into Dublin.]

If the liberty of trading be allowed at all, it will not be difficult to frame pretences of necessity from weather and accident to run into ports, or to protract a ship's stay there when really forced in for shelter.

Lord ELLENBOROUGH, C. J. :—

If the taking in the dollars at Gibraltar materially varied the risk of the underwriters, they would be discharged by it; but that it did not vary the risk by occasioning any delay of the voyage was expressly found by the jury to whom the question was left, and who were of opinion that the whole period of the ship's stay there was covered by the necessity which originally *induced the captain to go into Gibraltar. I have turned [*200] it in my mind whether the risk might not have been increased by the particular kind of cargo, namely, treasure, taken in there: if that were known at the time to an enemy, it might hold out an additional temptation to him to seek for and attack the ship. But I do not know that a mere temptation of this sort has ever been held a sufficient ground to avoid a policy if the original act itself were lawful. This, it must be remembered, is the case of a policy on ship and freight; I reserve giving any opinion as to the operation of a change in the state of the cargo in the case of a policy on goods; because the taking in of other goods in the course of one entire voyage, where it is not provided for, may be contended to constitute a different adventure from that on which the ship started with her original cargo. But here no part of the original cargo was taken out, as in *Stitt v. Wardell*; nor any narrower liberty reserved, as in *Sheriff v. Potts*, which might operate as a virtual exclusion of taking in other goods. But this case stands on its own ground: where something has been superadded to the original cargo while the ship was delayed from necessity in a port into which she was obliged to go; and the jury having negatived that any delay was occasioned by the taking in of the additional goods.

His Lordship, after the other Judges had delivered their opinions, added, that nothing said by the Court would justify the taking in any cargo in the course of the voyage which would in any manner enhance the risk of the underwriters.

GROSE, J. :—

The good sense of the thing, in ascertaining whether or [*201] not the act done avoided the policy, is to *know whether it did or did not increase the risk of the underwriters. Now here the jury having negatived any deviation from or delay in the voyage on account of taking in the dollars at Gibraltar, there seems no reason for saying that the risk of the underwriters was thereby increased: and therefore I will not disturb the verdict.

LAWRENCE, J. :—

I agree that the verdict is right. There is nothing in the terms of the policy to restrain the captain from taking in dollars: no additional risk was incurred to the ship by the nature of the cargo, from the laws of the country where it was taken in, which might have altered the case: but the jury have found that the ship went into Gibraltar on a necessary occasion, and did not stay there longer than that necessity justified. If Gibraltar had continued a port of Spain, there is no doubt but that the dollars might have been taken on board without vitiating the policy: but the objection is that because Gibraltar is not a port of Spain the taking them in there avoids the policy, although it be found by the jury that no delay in the voyage was thereby occasioned. This is not like a deviation; for that alters the risk insured; but here the risk was not in fact altered. Then it is said that it holds out a temptation to deviate. But if an intention to deviate, not carried into effect, will not avoid a policy, still less can a temptation to deviate; as in *Moss v. Byrom*, 7 T. R. 379 (3 R. R. 208). If the doing of a thing do not alter the risk of the underwriter, and be not expressly prohibited to be done, I cannot say that it vitiates the policy as upon the breach of an implied condition. The case of *Stitt v. Wardell* passed at *Nisi Prius*, and was not after- [*202] wards brought in review before *the Court; and though it was the opinion of a most eminent Judge; yet the greatest are liable to error in delivering their opinions on the sudden. And if the same question should occur again, I think it will deserve further consideration: for unless it can be shown that the underwriters' risk is varied by taking out part of a cargo in the course of the voyage, as at present advised, I do not understand how it can avoid the policy.

LE BLANC, J. :—

I am of the same opinion. Two cases have been relied on to

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show that the mere fact of taking out and selling part of the cargo, or the taking in other goods in the course of the voyage, will avoid the policy; but those were decisions at *Nisi Prius*, which were never brought before the Court, and might have turned on the particular circumstances of those cases. But now the question is fairly raised and brought before the Court, we must decide it according to the principle by which marine policies of insurance are governed in respect of implied conditions. It is said, that because liberty is sometimes expressly reserved for a ship to touch, stay, and trade in the course of the voyage, it is impliedly excluded in every policy in which it is not so reserved; but the reason of the express reservation is in order to justify the delay in trading; the staying at a place for the very purpose of trading there: but if a ship touch at a port which is allowed, and stay there for any reason which is allowable within the intent and meaning of the policy, and no additional risk to the underwriters be incurred by her trading there during such her stay for an allowed or justifiable cause, I can see no reason why such a trading should in itself avoid the policy. It is said, however, that the giving liberty to trade at all will be a temptation to the master to deviate from and to *delay the voyage with that view, and [* 203] that it will be difficult for the underwriters to detect it: but that must necessarily be a question for the jury to decide, as in other cases of fraud, whether the deviation or delay arose from necessity or from the trading; and wherever the case was doubtful upon the evidence, it would generally turn the verdict against the assured, who would have to account for the delay or deviation. But where it is found that no delay was occasioned by the trading, I see no reason why we should imply a condition which the parties themselves have not made, in order to avoid the policy as for a breach of it. Neither do I think it would be generally convenient to increase the number of small circumstances unconnected with the occasion of the loss, which will relieve the underwriters from their engagement to indemnify the assured, by the introduction of new implied conditions which the parties do not express in the policy.

Rule discharged.

Hammond v. Reid.

4 Barn. & Ald. 72-75 (22 R. R. 629).

Insurance. — Deviation. — Call for Purpose Unconnected with the Voyage.

[72] Policy of insurance from Para to New York, with leave to call at any of the Windward and Leeward islands on the passage, and to discharge, exchange, and take on board the whole or any part of any cargo at any ports or places, particularly at all or any of the Windward and Leeward islands, without being deemed any deviation: *Held*, on this policy, the ship having proceeded to two of the Leeward islands for a purpose wholly unconnected with the voyage, that it was a deviation, and vitiated the insurance.

Action on a policy of insurance on the ship *Arabella*, on a voyage at and from Para to New York, during her stay there, and at and from thence to Para, with leave to call at all or any of the Windward and Leeward islands and colonies on her passage to New York, with leave to discharge, exchange, and take on board the whole or any part of any cargo or cargoes at any ports [* 73] or places she might call at or proceed to, particularly * at all or any of the Windward and Leeward islands, without being deemed any deviation from and without prejudice to the insurance. The declaration stated the sailing of the vessel on the voyage insured, and a loss by perils of the seas. Plea general issue. At the trial, at the Lancaster Summer assizes, 1819, before BAYLEY, J., a verdict was found for the plaintiff subject to the opinion of the Court on a case, which stated that the ship sailed from Para on the voyage insured with a cargo on board, bound for New York; but with orders from the plaintiff, her owner, to proceed in the first instance to Barbadoes, where the captain was directed to sell the cargo and receive other goods on board in exchange for it, and proceed from thence to New York, after calling at the islands of St. Bartholomew and St. Thomas, two of the Leeward islands, for the purposes after stated. When the vessel sailed from Para the plaintiff was there, and intended to proceed from thence in another vessel direct to New York, where he expected to meet a vessel, also belonging to himself, called the *Alice*, from Liverpool, which last-mentioned vessel he then proposed to load at New York with goods for the said islands of St. Bartholomew and St. Thomas, and directed the captain of the *Arabella*, after finishing his trading at Barbadoes, to proceed to St. Bartholomew and St. Thomas, for the purpose of obtaining

information in regard to the state of the market, and on other subjects at those islands, with the views of forming his opinion upon the speculation he proposed to enter into by the said ship *Alice* from New York to those islands. The *Arabella* arrived at Barbadoes on the 5th March, 1817, where she discharged her cargo, and received on board a quantity of sugar, with which she sailed for *New York on the 4th of April fol- [* 74] lowing, intending to call at St. Bartholomew's and St. Thomas's, two of the Leeward islands, in her way to New York. In the course of this voyage, after having passed the islands of St. Bartholomew and St. Thomas, she was lost off Savannah. When the ship sailed from Barbadoes, on the 4th of April, her objects of trade were at an end until she should arrive at New York, and she proceeded to the islands of St. Bartholomew and St. Thomas only to obtain information for the purpose before stated.

Littledale, for the plaintiff, contended, that the going to the islands of St. Bartholomew and St. Thomas was no deviation. Here is an express leave given to touch at all or any of the Windward or Leeward islands. Under that liberty the vessel had a right to go to the islands in question. And, besides, the intelligence obtained there might probably have some effect on her ultimate destination.

F. POLLOCK, *contra*, after citing *Rucker v. Allwatt*, 15 East, 278 (13 R. R. 465), and *Langhorn v. Allwatt*, 4 Taunt. 519 (13 R. R. 663), was stopped by the Court.

ABBOTT, C. J. This calling at the islands of St. Bartholomew and St. Thomas was for a purpose wholly unconnected with the voyage in question. If, as it was said, the intelligence to be obtained there would be likely to have altered the destination of the ship the question would be different. But the contrary is expressly stated in the case; for it is stated that it had reference to some new adventure to be subsequently *undertaken [* 75] in another vessel. I think, therefore, that this, being a calling for a purpose entirely unconnected with the voyage, was, notwithstanding the words in the policy, a deviation, and that the plaintiff is not entitled to recover.

PER CURIAM,

Judgment for the defendant.

ENGLISH NOTES.

In an action on a policy taken out by the captain of an East India-man upon his effects for a voyage at and from London to Madras and

China, with liberty to touch and stay and trade at any ports or places whatsoever, it was held that the ship, arriving at Madras too late to proceed to China, might make an intermediate voyage from Madras to Bengal, — that being the usage of the trade in the case of ships employed by the East India Company, — and that the intermediate voyage was within the policy. *Gregory v. Christie* (1784), 3 Dougl. 419.

Cruikshank v. Janson (1810), 2 Taunt. 301, 11 R. R. 584, was an action upon a policy of insurance “at and from Jamaica to London.” The ship, having taken in cargo at Port Maria, which is considered a hazardous station, sailed for Port Antonio, an accustomed rendezvous in the same island, intending to wait there for convoy. In going thither the ship was lost. It was held that this was no deviation.

The rule in *Raine v. Bell* was followed and confirmed in *Cormack v. Gladstone* (1809), 11 East, 347, 10 R. R. 518; and in *Laroche v. Oswin* (1810), 12 East, 131, 11 R. R. 337.

In *Rucker v. Albnutt* (1812), 15 East, 278, 13 R. R. 465, a somewhat wide construction was, having regard to the indefinite objects of the voyage, given to the liberty “to touch and stay.” The insurance was “at and from London to any port or ports, place or places in the Baltic, backwards and forwards, . . . with leave to seek, . . . touch, and stay at any ports or places for all purposes whatsoever, take in and discharge goods wheresoever the ship might touch at; . . . particularly with leave to wait for information off any ports or places, take in and land passengers.” The defence was that the ship had deviated by a stay at Carlshamm which was prolonged by waiting for information as to the safety of various ports. At the trial, Lord ELLENBOROUGH had taken the view that, if the stay was longer than was necessary for the general purposes of the ship exclusive of the mere purpose of obtaining information as to some convenient and safe place of destination, it was not within the liberty of the policy; and on his ruling to that effect a verdict had been found for the defendant. After argument on a motion for a new trial, Lord ELLENBOROUGH said: “Where the destination of a ship is certain, and the objects of the voyage previously ascertained, I should have no doubt in construing the words of leave ‘to touch and stay at any ports and places for all purposes whatsoever,’ to mean merely for the purposes of the voyage so ascertained, and not as giving leave to stay at a port for the purpose of speculating, as in a coffee-house, upon the political state of Europe; but only to touch and stay there for the purposes of that voyage, or to avoid some impending peril. . . . Considering that this adventure had no one definite object at the time, but that the ship had to seek her ports of discharge in the Baltic according to the information to be collected there, we must look at the general

words of leave to touch and stay at any port for all purposes whatsoever, not as we should read them in an ordinary policy upon a definite voyage — which would not authorize the ship to stay at a port in the voyage merely for the purpose of procuring information as to her ulterior destination, nor in general for any purpose not connected with the port wherein the stay was made — but with reference to the peculiar nature of this adventure. The general words written, giving leave to touch and stay at any ports for all purposes whatsoever, are certainly words of enlargement beyond the common printed form; and with reference to this adventure, in which the assured had to seek information in the Baltic as to the ship's port or ports of discharge, would certainly include a liberty to stay at any port there *for information* on that subject: and the only doubt has arisen upon the subsequent special words introduced, giving leave to wait for information off any ports; which seemed to me at first to imply an exclusion of waiting for that purpose in any port. But upon further consideration, it now appears to me that the latter words do not necessarily restrain the former, because they provide for something which was not provided for before. There are other purposes for which the ship might wait off a port, besides the obtaining of information, for which special leave is given; such as for taking in and landing passengers; which under the general words would have been a deviation: there was therefore an object in introducing the special words which was not before provided for. In the case then of this new species of adventure, where the obtaining of information as to the ports of discharge of the ship was so material an object of the insurance in the convulsed state of the Baltic shores; but without saying that the ship might thus wait at a port for any length of time, or that the assured must not execute the purpose promptly; I am now less inclined than I was before to think that the assured were precluded from going into and waiting at Carlshamm for information: at least I should not be satisfied without giving them an opportunity of having the case further considered."

The other Judges concurred in directing a new trial.

In some cases the liberty "to touch" has been held to authorise trading at a port, where such trading appeared to be within the scope of the purpose of the voyage.

In a policy on goods "at and from Plymouth to Malta, with liberty to touch at Penzance," it was held that the landing of the goods insured might be completed at Penzance. *Violett v. Allnutt* (1811), 3 Taunt. 419, 12 R. R. 676. In *Urquhart v. Bernard* (1809), 1 Taunt. 450, 10 R. R. 574, where there was liberty "to touch" without anything to explain the purpose for which it was to be allowed, Sir J. MANSFIELD admitted a letter communicated to the underwriter show-

ing that the purpose was to take in salt, and held that by doing so the vessel did not avoid the policy.

And on a policy "at and from Antigua to England with liberty to touch at all or any of the West India Islands," GIBBS, C. J., inferred the main object of the voyage to be that the vessel was to go about seeking cargo; and so held that a stay at one of the islands to take in cargo was not a deviation. *Metcalfe v. Parry* (1814), 4 Camp. 123, 15 R. R. 734; *Urquhart v. Bernard*, *supra*. See also *Ashley v. Pratt*, *Pratt v. Ashley* (1847), 16 M. & W. 471, and (Ex. Ch.), 1 Ex. 257 cited in notes to *Clason v. Simmonds*, and *Beatson v. Haworth*, Nos. 5 & 6, p. 389, *post*.

In *Inglis v. Fauce* (1813), 3 Camp. 437, 14 R. R. 778, a ship was insured "at and from Liverpool to Martinique and all or any of the Windward and Leeward Islands, with liberty to touch at any ports or places whatsoever, to take on board and land goods, stores, &c." She sailed from Liverpool on the 13th March, 1811, and arrived at Martinique about the 20th of May following. There the captain disposed of his outward cargo, except a small quantity of lime and bricks. With these he sailed for Antigua, where he arrived on the 31st of May. Here the ship stayed until 8th of July, when she was wrecked in a hurricane, with the lime and bricks still on board. The captain, being examined as a witness, stated that he stopped at Antigua, partly to dispose of the outward cargo, and partly to procure a homeward cargo. Lord ELLENBOROUGH said: "The captain had no right to mix up together the two objects, of disposing of the remnant of the outward cargo, and procuring a homeward cargo, at the risk of the underwriters on the outward voyage. When the disposal of the outward cargo ceased to be the sole reason for his stay at Antigua, these underwriters were discharged." A verdict was accordingly found for the defendant.

In *Williams v. Shee* (1813), 3 Camp. 469, 14 R. R. 811, goods were insured by ship S. "at and from London to Barbice with liberty to touch and stay at any ports and places whatsoever and wheresoever, and for all purposes whatsoever, particularly to land, load, and exchange goods, without being deemed a deviation." The ship arrived with convoy off Madeira on Saturday, 17th of October, 1812, and pursuant to orders the captain began to land goods intending to take in wines. Not being able to do this on the Sunday, he waited until the Monday by which time the convoy with most of the fleet had sailed. Garrow, A. G., contended that the underwriters were discharged, (*inter alia*) on the ground that the ship by putting into Madeira and staying behind there when the rest of the fleet had sailed had been guilty of a deviation. Parke, for the plaintiff insisted that the plaintiff had

a right to put into Madeira, and to stop there in the manner he had done, under the liberty given by the policy to touch and stay at all ports and places to land, load, and exchange goods. Lord ELLENBOROUGH, C. J., held that the underwriters were discharged and nonsuited the plaintiff. He said: "The liberty in the policy must be construed with reference to the main scope of the voyage insured. Upon well-established principles the ship was guilty of a deviation by putting into Madeira and voluntarily staying behind there for the purposes of trade, when the rest of the fleet had sailed away in the prosecution of the voyage."

The latter branch of the rule is again illustrated in the case of *Solly v. Whitmore* (1821), 5 B. & Ald. 45, 24 R. R. 274. The insurance was "at and from Hull to ports of loading in the Baltic" with liberty "in the said voyage to proceed and sail to, and touch and stay at any ports or places whatsoever for all purposes, particularly at Elsinore, without being deemed a deviation." The ship at Hull took on board sundry packages for Elsinore and Dantzic, and delivered them at those places before proceeding to Pillau which was her intended port of loading. She was lost on the way from Dantzic to Pillau. It was held that as she went to Elsinore and Dantzic only to deliver goods, which was a purpose wholly unconnected with the purpose of the voyage, it was a deviation.

In *Warre v. Miller* (Ex. Ch. 1825), 4 B. & C. 538, the action was on an insurance on freight on the ship A. "at and from Grenada to London." The ship had discharged part of her outward cargo at three different bays in Grenada, and was proceeding to a fourth (Grenville Bay), to discharge the residue of her outward cargo and to take in part of her homeward cargo; when she was lost by perils of the sea. It was proved that there was only one custom-house for the island, and that freight had been engaged by several persons for homeward cargo; and it appeared that according to the common course of proceeding at all the West India Islands the outward cargo is discharged and homeward cargo taken in at convenient places on the coast near the different estates. It was urged that the unloading at Grenville Bay was a purpose unconnected with the purposes of the voyage insured, and that the employment for that purpose was a deviation. On the contrary it was argued that as Grenada has only one custom-house, and is in law all one port, the going from bay to bay for the purposes of delivering the outward cargo was the same as going from quay to quay, in one large harbour; that the policy attached upon her arrival at the first bay; that had she proceeded to discharge the whole cargo there and been lost while that process was going on, she would clearly have been protected, and it can make no difference that she delivered her cargo at

various places or bays in that port. The Court held that there was no deviation. ABBOTT, C. J., said: "I think that Grenada must be considered as all one place, as was properly contended in argument; and as the outward cargo must be delivered before the homeward can be taken in, that is a necessary preparation for the homeward voyage. The employment in which the ship was engaged at the time of the loss was connected with the homeward voyage, and was consequently a part of the risk which the underwriter had taken upon himself."

Upon a policy "at and from London to New South Wales and at and from thence to all ports and places in the East Indies or South America, with liberty . . . in that voyage . . . to touch and stay at any ports or places whatsoever, . . . particularly to trade and sail backwards and forwards, and forwards and backwards":—The captain had orders (unless he should receive contrary directions from the owner) to go to New Zealand and take in spars there and proceed to South America. After arriving in New South Wales the captain received instructions from the owner to proceed to the East Indies instead of South America. In the meantime he had entered into a contract to take passengers to New Zealand (which is on the way from New South Wales to South America, but not on the way from New South Wales to the East Indies), and in spite of the instructions he determined to take the ship to New Zealand, intending to return to New South Wales and proceed thence to the East Indies. The ship accordingly went to New Zealand and was lost on coming out of port there on her return to New South Wales. The jury having found that the act of the master was in good faith and not barratrous (so that there was not a loss by barratry which would have been within the policy), the LORD CHIEF JUSTICE directed a nonsuit on the ground that at the time of the loss the ship was not sailing on either of the voyages contemplated by the policy. This ruling was maintained by the Court (ABBOTT, C. J., BAILEY, J., HOLROYD, J., and LITLEDALE, J.). ABBOTT, C. J., observed: "Large as the words of the liberty are, they must receive that construction which has been given to similar words in other cases; and giving them that construction, we must hold that by this policy the ship would be protected by the policy so long only as she was sailing on an intermediate voyage, undertaken with a view to the accomplishment of one or other of the voyages pointed out by the policy as the principal object in contemplation of the parties, viz., a voyage either to South America or the East Indies. . . . In this case at the time of the loss she was on a distinct voyage not subordinate to or connected with either of the voyages contemplated by the parties as the principal objects of the contract. That being so, she was not at that time on the voyage insured, and, consequently the plaintiff is not

entitled to recover.” BAILEY, J., said: “In order to be within the protection of the policy the ship must be either on the way to South America, South America being the ultimate object, or to the East Indies, the East Indies being the ultimate object of the voyage. But here the vessel sailed on an intermediate voyage to New Zealand and back, and although New Zealand is on the way from New South Wales to South America, yet that voyage was commenced without having for its ultimate object the voyage to South America, and New Zealand was not on the way to the East Indies. The ship, therefore, at the time of the loss, was not on a voyage contemplated by the policy, and therefore, the underwriters are not liable.” *Bottomley v. Borill* (1826), 5 B. & C. 210.

The cases of *Cruickshank v. Janson* (*supra*), and *Warre v. Miller* (*supra*), were distinguished by the King’s Bench in *Brown v. Tayleur* (1835), 4 Adol. & Ell. 241. The insurance was ‘at and from her port of lading in North America to Liverpool.’ She took in part of her cargo at Cocagne and sailed from there to Buktonche to complete her loading. Then she returned to Cocagne to take in provisions and get ready for sea. She afterwards sailed for England and was lost on the voyage home. Cocagne and Buktonche are situated on different creeks of the same bay, and the distance between them is variously stated at 5 to 7 miles. Neither of these places had a custom house, but there were officers of customs at both places. Buktonche is not in the line of voyage from Cocagne to Liverpool. The Court held that the sailing to Buktonche was a deviation, and that the underwriters were discharged. Lord DENMAN, C. J., said: “There was no technical meaning to be attached to the words ‘port of lading.’ If it could have been shown that the two places were in reality one, the plaintiffs should have produced evidence to that effect.” PATTESON, J., said (4 Adol. & Ell. 247): “We cannot construe the words ‘at and from her port of lading,’ as if they were ‘at and from her ports;’ the expression used points out one single place. Nor can we adopt the technical meaning which may be ascribed to ‘port,’ as signifying all that is subject to one custom-house, or one port jurisdiction; the result of which would be that a ship, under such a policy as this, might sail to every part of a district so situated. The cases which explain the meaning of the word ‘port,’ as here used, are not many. There is one (*The Sea Insurance Company of Scotland v. Garin*, 4 Bligh, N. S. 578, s. c. 2 Dow. & Clark, 125), where a brigantine was insured to Barcelona, and at and from thence, and two other ports in Spain, to a port in Great Britain; and she put into a place situate in the recess of a bay, having a custom-house and port captain, and having also warehouses, and a jetty, with accommodation for small ves-

sels only, there being, however, convenient anchorage for large ones in the roadstead; and, the ship having been lost in the roadstead, this was held to be a port within the meaning of the policy. Here I think that 'port' means the same as place, and that the vessel's place of loading must be one place. When she had once begun to take her cargo at Cocagne, that was her place of lading, and her removal afterwards to Buktonche was a deviation. The cases of insurance at and from Jamaica, and Grenada, do not apply. There the words used would comprehend all places in the island. If the policies in those cases had said 'at and from her port of lading in Jamaica' or Grenada, the commencement of the voyage would have been restricted to one particular place. That the two places here are within the jurisdiction of a single custom-house, makes no difference. If that entitled the ship to go from one to the other, she might also have gone to St. John. In construing the word 'port' as the place of lading, I do not mean to say that, if a ship were at a particular quay on a river, as at Liverpool, and merely removed to another quay a mile or two off, that would be a deviation, because the vessel there would be all the time in one port and place; but it is a deviation if she removes to a different town, a different place of habitation, and a point which might itself be her place of lading." WILLIAMS, J., said: "The words used in the policy is 'port' of lading, in the singular number; we cannot construe that as ports. And the moment the taking in of the cargo was begun at Cocagne, that was to be considered as the port of lading designated. Had evidence been given that, for purposes of this kind, Cocagne and Buktonche formed in fact only one place, the case would have been different. But if, by means of the construction attempted, places at a distance from each other can be included under the term 'port of lading,' what rule of restriction can be laid down? May the places be fifty, or a hundred miles apart? 'Jamaica and 'Grenada,' in the cases which have been referred to, signified the whole of these islands. It would have been a violence there to limit the meaning of the policy to a single port. Here nothing warrants the extension insisted upon."

The distinction between an intention to deviate not carried out, and sailing on a different voyage although without arriving at the dividing point, was clearly laid down in the case of *Woolbridge v. Boydell* (1778), 1 Doug. 16, where it was decided that, if a ship insured for one voyage sails upon another, although she is taken before the dividing point of the two voyages, the policy is discharged. The insurance in that case was "at and from Maryland to Cadiz." The ship was taken in Chesapeake Bay; and the evidence showed that she was destined for Falmouth and not for Cadiz. The underwriters were held to be discharged. Lord MANSFIELD said: "A deviation merely intended but

Nos. 3, 4. — *Raine v. Bell*; *Hammond v. Reid*. — Notes.

never carried into effect is as no deviation. In all the cases of that sort the *terminus a quo* and *ad quem* were certain and the same. Here, was the voyage ever intended for Cadiz? Some of the papers say 'to Falmouth and a market,' some 'to Falmouth' only. None mentions Cadiz, nor was there any person in the ship who ever heard of any intention to go to that port. . . . In short, that was never the voyage intended, and consequently is not what the underwriters meant to insure."

The distinction between an intention to deviate, and sailing on a different voyage, is sometimes very fine. And since, where the dividing point has been passed, the intention becomes immaterial, both classes of cases are frequently treated under the common name of deviation. In *Kewley v. Ryan* (1794), 2 H. Bl. 343, 3 R. R. 408, the distinction came directly into question. The insurance was "at and from Grenada to Liverpool." The ship was in fact bound for Liverpool, had also obtained clearances for Cork, where she intended to touch. She was lost before reaching the dividing point. The Court of Common Pleas held that the underwriters were not discharged. They observed: "In *Woolbridge v. Boydell* (*supra*), it appeared there was no intention that the ship should go to Cadiz at all, which was mentioned in the policy as her port of delivery, and in *Way v. Modigliani* (1787, 2 T. R. 30, 1 R. R. 412), there was an actual deviation by the ship going to fish on the banks of Newfoundland; those cases therefore were wholly different from the present, for here the ship was really bound for Liverpool, though there were also clearances for Cork."

In this connection may be mentioned the case of *Middlewood v. Blakes* (1797), 7 T. R. 162, 4 R. R. 405. Goods were insured on ship from London to Jamaica. She sailed with instructions (pursuant to charter-party), to touch at a certain port in St. Domingo which would have been a deviation. From a certain point on the voyage from London to Jamaica there are three tracks any one of which a ship may take. The northernmost of these goes near the port in question. The ship had past the dividing point of the three tracks, and sailed on the northernmost one, but was taken before arriving at the subdividing point where she would have turned into the port. A verdict for the defendant was upheld, by Lord KENYON, C. J., ASHURST, J., and GROSE, J., on the ground that the concealment of the destination under charter-party to go to the port at St. Domingo vitiated the policy; by LAWRENCE, J., on the ground that the actual taking of the northern course by the captain on passing the dividing point, not because it was the best to Jamaica but in order to go to St. Domingo, was a deviation.

In *Driscoll v. Passmore* (1798), 1 Bos. & P. 200, 4 R. R. 782, freight was insured on board ship *Timandra* from Saffi to Lisbon, and at the time of making the assurance it was stated that the ship was at Madeira and about to sail thence to Saffi; from whence she was to sail back to Lisbon, with a cargo of wheat. Owing to an alarm of Moorish cruisers the captain was compelled, instead of going to Saffi, to take the ship back to Lisbon. He sailed from thence in ballast to Saffi, and was returning with a cargo of wheat when the ship was captured. The policy was construed as on a voyage from Saffi to Lisbon only. The representation of the intention to proceed from Madeira to Saffi, was true at the time, and as it was frustrated by circumstances, and the voyage from Saffi to Lisbon never abandoned, but actually entered on, the insured were held entitled to recover.

In a Scotch case *Tascker v. Cunninghame* (1819), 1 Bligh, 87, 20 R. R. 33, the House of Lords, reversing all the judgments of the Courts in Scotland, decided that a determination made by the agents duly authorized and acknowledged by the owners, not to sail upon the voyage insured but on a different voyage, discharges the underwriters. The agents at Cadiz of shipowners in England advised the ship-owners that they were about to despatch their ship to Liverpool, upon which the owners insured her accordingly "at and from Cadiz to Great Britain." Soon after the despatch of the former advice, the agents wrote to the owners that, owing to a change of circumstances, and with the advice and concurrence of the captain, they have determined to send the ship direct to Newfoundland. Eight days after this new determination, the ship was stranded in the Bay of Cadiz and burnt by the French. The letter advising the change of determination and one reporting the loss of the ship, reached the owners by the same post. Lord ELDON (Lord Chancellor) said: "Undoubtedly a mere meditated change does not affect a policy. But circumstances are to be taken as evidence of a determination, and what better evidence can we have, than that those who were authorised had determined to change the voyage? In my opinion the voyage was abandoned; and I have the highest authority in Westminster Hall to confirm that opinion."

AMERICAN NOTES.

The better opinion now is, that if liberty is granted to "touch" or to "to touch and stay" at an intermediate port, the insured may trade there when consistent with the object and the furtherance of the adventure, by breaking bulk or by discharging or taking on cargo, if it neither produces unreasonable delay nor enhances nor varies the risk. 3 Kent's Commentaries, *311; *Chase v. Eagle Ins. Co.*, 5 Pickering (Mass.), 50; *Thorndike v. Bordman*, 1 ibid. 471. This doctrine was established by Chief Justice MARSHALL, in *Hughes v. Union Ins. Co.*, 3 Wheaton (U. S. Supr. Ct.), 159. The

No. 5. — Clason v. Simmonds. — Rule.

policy permitted a stop at Matanzas, on representation that the stop was to be made to ascertain if there were any men of war off the Havanna. At Matanzas the ship unloaded her cargo in obedience to the Spanish authorities. "It produced no delay, no increase of risk, and did not alter the voyage. The vessel pursued precisely the course marked out for her in the policy. In reason nothing can be found in this transaction which ought to discharge the underwriters." Citing *Kingston v. Gerard*, 4 Dallas (Penn.), 274. Distinguishing *Maryland Ins. Co. v. LeRoy*, 7 Cranch (U. S. Supr. Ct.), 26, where the policy permitted a certain touching to buy "stock, such as hogs, goats, and poultry, and take in water." There was a delay of seventeen days, a fortnight in excess of the usual delay for the permitted purposes for the purpose of taking in jackasses. The Court held that the jackass business avoided the policy. (This was the famous case in which Pinkney, the celebrated attorney-general, being informed that ladies were in Court to hear him, made a great effort at eloquence, but was handicapped by the nature of his theme. "He tore all to tatters," said Story, but it was admitted that he made a comparative failure.)

No. 5. — CLASON *v.* SIMMONDS.

(CORAM LEE, CH. J., 1741.)

No. 6. — BEATSON *v.* HAWORTH.

(1796.)

RULE.

WHERE a ship is insured on a voyage to "ports of discharge" which are not specifically named in the policy, the general principle is that the ship must visit such ports in the geographical order of their distance from the terminus *a quo*, or point of departure. (Arnold, *Insur.* 5th ed. p. 460).

But if the several ports of discharge are specifically named in the policy, then, unless there is a settled usage to the contrary, the ports must be visited in the order in which their names occur in the policy, whether that be the geographical order or not; otherwise it is a deviation.

 No. 5. — Clason v. Simmonds, 6 T. R. 533, 534.

Clason v. Simmonds.

6 T. R. 533-534 (3 R. R. 260).

Insurance. — Deviation. — Order of Ports.

Where a voyage is described in a policy as one "to ports of discharge," it is a deviation to go back to a port out of the geographical order.

[533] An insurance was made upon goods in the *Gothic Lion* at and from London to her ports of discharge in the Streights as high as Messina; with power in the voyage to stop or stay at any ports or places whatsoever. She was freighted with lead of the plaintiff's from London to Marseilles, and went into Falmouth, where she staid three weeks, and took in a freight of tin for Marseilles. Before she went from London the plaintiff, who was an owner of the ship, declared she was to go directly to Genoa, Leghorn, and Naples, and there was no talk of Marseilles. When the ship was off Marseilles the wind was against her, and she could not then get in, but being driven towards Corsica, went to Genoa, and from thence to Leghorn; and in coming back again to Marseilles, being attacked by a Spanish privateer, she was blown up and the lead lost. In the action upon the policy, it was proved by several captains of ships, and so held by the Chief Justice, 1st, That the going into Falmouth and staying there was a deviation. If she had been obliged to put in by necessity, or if it were in the usual course of the voyage, though perhaps not in the direct road, it would be no deviation to put in there. But she stayed at Falmouth three weeks, and took in a freight for Marseilles, which seems to be strong evidence of having wilfully gone out of the way; and against the declaration of the plaintiff made previous to her going that voyage. 2dly, That as she did not stop at Marseilles, this was acting contrary to the terms of the policy; for by her ports of discharge must be understood such ports at which it was intended goods should be delivered, and the first of those was Marseilles. 3dly, It was sworn by several captains to be their opinion (but the Ch. J. did not say anything to this point) that the going no further in the Streights than Leghorn, and then returning back again, was a determination of the [* 534] insurance at Leghorn, and the insurers discharged *from the loss that happened afterwards. And upon this there was a verdict for the defendant.

PER CURIAM.

Rule absolute.

Beatson v. Haworth.

6 T. R. 531-533 (3 R. R. 258).

Insurance. — Deviation. — Order of Ports.

If the voyage described in a policy be “from A. to B. and C.” and the [531] ship go to C. before B. (though C. be nearer to A. than B. is), it is a deviation, and the plaintiff cannot recover for any subsequent loss, if it be not the regular and settled course of the voyage to go to C. first. And Qu. whether such a regular and settled course of voyage will control such a policy?

This was an action on a policy on the ship *Bazil* “at and from Fisherrow to Gothenburgh, and back to Leith and Cockenzie;” valued at £500 without further account to be given. At the trial before Lord KENYON at Guildhall it appeared that the ship performed her voyage outward to Gothenburgh, and having taken in goods both for Leith and Cockenzie, in her return home in the spring of 1787, without going to Leith first, put into Cockenzie, where she was stranded and lost. It was given in evidence that Leith was a very safe and commodious harbour, and Cockenzie a very small and *insecure one, especially in the winter [* 532] season. That the two places are about ten miles apart from each other; but Cockenzie lies nearer to Gothenburgh than Leith, and it is about a mile and a half out of the way to put into Cockenzie in going from Gothenburgh to Leith. There did not appear to be any settled course of trade to regulate the track of the voyage in this respect; though the weight of the evidence was in favour of going first to Leith in point of prudence, owing to the insecurity of the harbour of Cockenzie in general; for by discharging the lading for Leith there in the first instance, the risk of going into the harbour of Cockenzie was thereby much lessened. Two objections were made at the trial on the part of the defendant: 1st, That as the ship went into Cockenzie before she went to Leith, it was a deviation from the voyage described in the policy, which was to Leith and Cockenzie; 2dly, That this was a gaming policy within the statute 19 Geo. II. c. 37, being without proof of interest. Both points were reserved; but the decision went wholly on the first. A verdict was agreed to be taken for the plaintiff, without prejudice to the defendant, subject to the opinion of the Court upon the points of law; with liberty to the defendant to move to enter a nonsuit. A rule to that effect having been obtained,

Gibbs now showed cause against it; saying, that it had never

been held necessary where two ports of discharge are named in a policy for the ship to go first to that which happens to be named first in the policy. Every underwriter must be taken to be cognizant of the nature of the voyage which he insures, and of the course of trade which prevails in it. He must be taken to know the relative situations of the several places from and to which the vessel is insured; therefore here the defendant must have known that Cockenzie lay between Gothenburgh and Leith, and that the vessel would naturally touch at Cockenzie first, there being no course of trade to regulate her voyage otherwise; that being the shortest and most convenient track. Where a particular track is intended to be chalked out by the underwriter, the usual form of describing it is from A. to B. and from B. to C. The general mode of expression therefore adopted in his case, from A. to B. and C., shows that it was intended to leave it to the discretion of the captain; and this is confirmed by the circumstance of there being no particular usage, but sometimes the one and sometimes the other is the first port of delivery, according to the convenience of the traders.

[* 533] *The Court were of opinion that, as the intended voyage was described in the policy, and as there was no regular and settled course, known to all the traders, different from that so described, the ship deviated by putting into Cockenzie first, and consequently that the plaintiff could not recover.

ENGLISH NOTES.

Marsden v. Reid (1803), 3 East. 572. 7 R. R. 516, was an action upon a policy on goods insured "at and from Liverpool to Palermo, Messina, Naples and (in an event which did not happen) Leghorn." The vessel took in goods and cleared for Naples only, and was lost before coming to the dividing point of the routes for the several places named in the policy. The plaintiff was held entitled to recover. Lord ELLENBOROUGH said: "I think that the voyage insured to Palermo, Messina, and Naples meant a voyage to all or any of the places named; with this reserve only, that if the ship went to more than one place she must visit them in the order described in the policy. . . . Upon the true construction of such an insurance as this the assured is at liberty to drop any of the places named; but if he goes to more than one he must take them in the order named in the policy."

Gairdner v. Senhouse (1810), 3 Taunt. 16, 12 R. R. 573, was an action on a policy "at and from London to Trinidad, and any port or

Nos. 5, 6. — *Clason v. Simmonds*; *Beatson v. Haworth*. — Notes.

ports of discharge in the Spanish Main, all or either, with leave to call at all or any of the West India Islands or settlements, Jamaica and St. Domingo excepted. . . . liberty to touch and stay at any ports and places whatsoever. . . ." The ship proceeded under convoy to Demarara and then ran down the wind, and after touching at Martinique shaped her course for St. Thomas and was there lost. It was stated in evidence that if the vessel intended to go to the Spanish Main or Trinidad it would be out of her course to run down to Martinique or St. Thomas as she would have to beat up against the wind afterwards. After a verdict for the plaintiff, it was held on a motion for a new trial that the liberty in the policy must be restricted to places to be taken in the course of the voyage from London to Trinidad and the Spanish Main. So that if the ship in going to Martinique and St. Thomas was out of her course for Trinidad, it was a deviation. *Lavabre v. Wilson* (1779), 1 Doug. 284 (see notes to No. 10, p. 413. *post*), and *Hogg v. Horner*, 2 Park's Insur. were cited in the judgment, as well as *Beatson v. Haworth*, No. 6, and *Marsden v. Reid* (*supra*).

Where the *terminus a quo* and the *terminus ad quem* are given, and other ports within a certain sphere are mentioned generally as within the voyage, the words are not to be confined to such of the ports as lie in an ordinary course between the two *termini*. *Bragg v. Anderson* (1812), 4 Taunt. 229, 13 R. R. 584; *Lambert v. Liddard* (1814), 5 Taunt. 480, 1 Marsh. 149, 15 R. R. 557.

Mellish v. Andrews was an action upon a Baltic policy in time of war. It was several times tried, and the facts as found by special verdict at the last trial are stated in the report of the hearing on 6 Nov. 1813. 2 M. & S. 27. The insurance was "at and from London to the ship's discharging port or ports in the Baltic, with liberty to touch at any port or ports for orders or any other purpose." The ship touched at Carlshamm to obtain orders. The orders were to proceed to Swinemunde, a port further on, and there to receive further orders. On arriving off Swinemunde the captain received orders, because it was unsafe to land, to return to Carlshamm and there obtain further orders. She did return to Carlshamm and, having received damage in the voyage, put in there for repairs, and before the repairs could be executed was seized by order of the Swedish government. The Court of King's Bench, on this special verdict gave judgment for the plaintiff. A writ of error was brought in the Exchequer Chamber, where it was argued on the part of the defendant, plaintiff in error, that where the adventure is limited by "spaces" it is a settled rule that the course of the voyage must not be retrograde, except in the single instance (which was not the case here) where express liberty is given to trade backwards and forwards; but that all the permissions and liberties given to the vessel

must be exercised at the several ports and places which occur on the voyage, only in the successive order in which those places occur. The Court, in a judgment delivered by GIBBS, C. J. affirmed the judgment of the King's Bench. In his judgment, after adverting to the argument of the counsel for the plaintiff in error, it was observed that in all the cases which had been decided on that principle, the ship's port or ports of discharge had been a fixed point; but in the present case it was important that the power of electing the port of discharge should be continued up to the latest hour of the voyage. The judgment concluded as follows: "We are of opinion that, under a policy worded as this is, the assured had a right to go backwards and forwards from port to port for orders as to his port of discharge, until his port of discharge was fixed; after his port of discharge was once fixed, then the principle laid down on behalf of the plaintiff in error would have applied. For these reasons we think the judgment of the Court of King's Bench must be affirmed." *Andrews v. Mellish* (in error, 1814). 5 Taunt. 496.

The decision of the Exchequer Chamber in *Mellish v. Andrews* (*Andrews v. Mellish*), was followed and applied by the King's Bench in *Hunter v. Leathley* (1830), 10 B. & C. 858. They held that the latitude of intention to be inferred from the terms of the policy itself was sufficient to cover the alleged deviation as within the purpose of the voyage intended. This decision was affirmed in the Exchequer Chamber (reported s. n. *Leathley v. Hunter*, 1831, 5 Moo. & P. 457, 7 Bing. 517, 1 C. & J. 423, 1 Tyr. 355). The policy was on goods "in Java Packet at and from Sincapore, Penang, Malacca, and Batavia, all or any, to ship's port of discharge in Europe, with leave to touch, stay, and trade at all or any ports and places whatever and wheresoever in the East Indies, Persia, or elsewhere . . . with liberty also in that voyage to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever in any direction, and for any purpose, necessary or otherwise, . . . with leave to take on board, discharge, reload, or exchange goods or passengers without being deemed any deviation." The ship after taking in goods at Batavia proceeded to Sourabaya, which is 400 miles to the eastward of Batavia, and out of the course from Batavia, and the other places mentioned to Europe, took goods on board at Sourabaya, returned to Batavia, and proceeded thence to Europe. By the judgment of the Court of Exchequer Chamber delivered by TINDAL, C. J., various expressions in this policy (amongst others the mention of Persia, which at that time was 1000 miles out of any course from Batavia and the other places mentioned to Europe) were observed upon as showing an intention to embrace a number of places not named as optional loading or discharging ports. "Upon the whole

we think the shipping part of the cargo at Batavia, and thence proceeding to Sourabaya, and shipping other parts of the cargo there, and thence sailing back to Batavia, and thence with the cargo to Antwerp, was a trading voyage to Antwerp, by the way of Sourabaya, within the intention of the parties as expressed in the policy, and the two several clauses of license contained therein. . . . If the sailing from Batavia to Sourabaya, and thence back to Batavia, and thence to Europe, is a voyage described in the policy, it follows immediately that it cannot be treated as a deviation." A somewhat similar case to this was *Armet v. Innes* (1820), 4 J. B. Moore, 150, 21 R. R. 737.

A ship was insured "at and from Liverpool to ports and places in China and Manilla, all or any, during the ship's stay there for any purposes, and from thence to her port of calling and discharge in the United Kingdom." The ship sailed to China and discharged part of her outward cargo at a port there, then sailed to Manilla, where she discharged the residue. Finding freight low at Manilla she took in there only part of a cargo, and sailed back to the Chinese port where she loaded the rest. The Court of Exchequer held this to be no deviation, for the words "from thence" in the policy applied not to Manilla only but to the ports or places in China all or any. *Ashley v. Pratt* (1847), 16 M. & W. 471, 17 L. J. Ex. 135. Affirmed (Ex. Ch. 1847), *Pratt v. Ashley*, 1 Ex. 257.

In *Harrower v. Hutchinson* (Q. B. 1869, Ex. Ch. 1870), L. R., 4 Q. B. 523, 5 Q. B. 584, 38 L. J. Q. B. 185, 39 L. J. Q. B. 229, the insurance was on cargo "at and from Buenos Ayres and port or ports of loading in the Province of Buenos Ayres to port or ports of call in the United Kingdom." The ship, after partially loading at Buenos Ayres, went to L. where there is no port other than a sheltered roadstead which is used for the purpose of loading bones, &c., and having only partly filled up at L., sailed again for Buenos Ayres intending there to complete her homeward cargo, but was wrecked on the way thither. It was held by the Queen's Bench that L. was a "port" within the meaning of the policy, and that sailing to L. and back for Buenos Ayres was no deviation. The case came afterwards to the Exchequer Chamber, where the Court agreed with the Court below that L. was a port; but, without expressly deciding the question of deviation, held that the policy was void for concealment of the intention to go to L. which had been really determined upon, and for which if it had been disclosed, a higher premium would have been demanded.

AMERICAN NOTES.

Both principal cases are cited by Barber on Insurance, pp. 247, 248, without any analogous American cases, and their doctrine is adopted.

No. 7. — *Hartley v. Buggin.* — Rule.

In *Arnold v. Pacific M. Ins. Co.*, 78 New York, 7, the policy was on a voyage from Santos to "New York, Baltimore, or Boston, direct, or *via* Hampton Roads for orders." Held, that the insured was not bound to choose the port of discharge until arrival at Hampton Roads.

Kent (3 Commentaries, *315) cites the *Bealson case*, adding: "This liberty to touch, stay, and trade is always construed to be subordinate to the voyage insured, and to the usual course of that voyage, and for purposes connected with it."

Deviation from the geographical or specified order is excused by necessity. *Kane v. Columbian Ins. Co.*, 2 Johnson (New York), 261.

In *Houston v. New Eng. Ins. Co.*, 5 Pickering (Mass.), 89, a vessel insured from St. Johns to Kingston and a market in Jamaica, went to Port Maria instead of Kingston. Held, no deviation. The Court cited the *Kane case*, above, and *Marsden v. Reid*, 3 East, 572, as authority that "a vessel insured to several ports in succession may go to any one, without beginning the series, and may thence return to her port of discharge under the policy." "It would benefit neither that the vessel should be obliged to go to more ports than the purposes of the voyage make necessary."

In *Marine Ins. Co. v. Stras*, 1 Munford (Virginia), 408, however, it was held that a policy "at and from Norfolk to Curaçoa, with liberty of going to any other island in the West Indies, or any one port on the Spanish Main, and at and from thence back to Richmond," necessitated going to Curaçoa first, and did not justify going to St. Thomas, without necessity, and back to Norfolk without going to Curaçoa. Stress was laid on "thence;" and also on the return to Norfolk instead of Richmond (citing *Elliott v. Wilson*). This case was disapproved in the case last before cited.

In *Perkins v. Augusta, &c. Co.*, 10 Gray (Mass.), 312; 71 Am. Dec. 654, the voyage insured was "from New York to Gibraltar, and at and from thence to Tarragona, with liberty of using one port between Tarragona and Gibraltar, and at and thence to New York." Four months later permission was indorsed "to stop at one other port between Tarragona and Gibraltar." Held, that this permission was available on the homeward voyage, and conferred no right to stop at Gibraltar.

No 7. — HARTLEY *v.* BUGGIN.

(K. B. 1781.)

RULE.

DELAY for a purpose not having the voyage for its object, is equivalent to deviation: and it is not material, to constitute a deviation, that the risk should be increased.

A ship was insured for a voyage "at and from the coast of Africa to the West Indies with liberty to exchange goods and slaves." The ship stayed at the coast of Africa

No. 7. — *Hartley v. Buggin*, 3 Doug. 39.

for several months, during which time she was employed in receiving slaves on board which were afterwards put on board other ships and sent to the West Indies. *Held*, that this use of the ship — being in effect the employment of the vessel as a factory ship, and not a use having the voyage as its object — was a deviation.

Hartley v. Buggin.

3 Douglas, 39-41.

Insurance. — Deviation. — Delay for a Purpose not having the Voyage for its Object.

Insurance on ship at and from the coast of Africa to the West Indies, [39] with liberty to exchange goods and slaves. The ship staid at the coast of Africa several months, and was employed as a receiving ship for slaves, afterwards put on board other ships, which was the employment of a factory ship. *Held*, that this was a deviation.

This was an action on a policy of insurance upon the ship *Blossom*, at and from the coast of Africa to the West Indies, with liberty to exchange goods and slaves. The cause was tried at the last assizes at Lancaster, before HEATH, J., and a verdict was found for the plaintiff, with which the learned Judge reported himself satisfied.

On a rule obtained to show cause why there should not be a new trial, it appeared that there had been a great deal of contradictory evidence, and many points started at the trial; but the question now raised was, whether the plaintiff, by the use he made of the ship on the coast of Africa, and the delay he there occasioned, was not the cause of the loss: that is, whether he did not make such use of her, during her stay on the coast, as amounted to a deviation. It appeared in evidence that this ship staid on the coast from August to March: that she was employed in receiving slaves on board, the produce of the cargoes of other ships, which were afterwards put on board other ships and sent to the West Indies; that this is the employment of what they call a factory ship, but that a regular factory ship is thatched and covered, and receives the slaves till a sufficient number is collected to send away in other vessels; but it did not appear that any slaves, the

No. 7. — *Hartley v. Buggin*, 3 Doug. 39, 40.

produce of the *Blossom's* own cargo, were sent away in other vessels. It appeared, however, that her stay there was seven months beyond the usual stay of ships in that trade.

Wallace, Att.-Gen., Lee, Davenport, and Wood showed cause against the rule for a new trial. They contended that this use of the ship as a factory ship was not inconsistent with the object of the voyage. If the ship does nothing which increases her risk and prolongs her stay, or is inconsistent with the object of her voyage, it is not a deviation. Here she parted with no slave, the produce of her own cargo, which ever was on board of her. Ships can only be supplied in turn, and whilst she is forced to wait there she may as well receive the slaves of the other ships as not.

It is the course of the trade so to do. The definition of a [* 40] factory ship * is a floating warehouse, not her merely being thatched and covered.

Arden and Dunning, *contra*, in support of the rule, were stopped by the Court.

LORD MANSFIELD. When different points are agitated at a trial, and a great deal of evidence is applied to each, and the counsel go out of a cause, it is not surprising that juries should have their attention distracted from the principal point. The great advantage of a motion for a new trial is that after argument on the motion, the cause goes down again winnowed from the chaff of the first trial. The single question in this case is, whether there has not been what is equivalent to a deviation. It is not material, to constitute a deviation, that the risk should be increased. The voyage is to the coast of Africa, and thence to the West Indies, which includes an insurance on the ship while she stays and trades at Africa, and it is with liberty to exchange goods and slaves; but that exchange is for the benefit of the ship, one slave for another. If a ship insured for a trade is turned into a factory ship, or a floating warehouse, the risk is different; it varies the stay, for while she is used as a warehouse no cargo is bought for her.

The law being clear, how is the fact? The captain says the vessel was not used as a factory ship; but his evidence is much impeached. Indeed, he says that he was young in the trade, that he never saw a factory ship but once, and was not in her. He might have a salvo, because this vessel was not thatched, as factory ships usually are; but the question is, was she used as a factory ship? Without being thatched and roofed, she may have

No. 7. — *Hartley v. Buggin*, 3 Doug. 40, 41. — Notes.

been put to that use. The fact is clear; the risk is different, and there must be a new trial.

Rule absolute.

This cause was again tried at the Lancaster Summer Assizes, 1782, before EYRE, B., and evidence was given that, since the establishment of agencies on the coast, it had been a custom with the plaintiffs' ships to stay till others came, and that it was intended to go to the West Indies, just before the accident happened; that the putting the vessel *ashore was to pre- [*41] pare her for the voyage; that by agencies the sailing of ships was much expedited; and that she had not staid an extraordinary time. EYRE, B., told the jury that there was no question of fact; that it was clear the ship was employed as a factory. What the effect of that was afforded great room for argument. One side contended that it was usual and allowable in the course of trade; the other side, that it varied the risk materially. New modes of trade were advantageous, and it was not for the interests of commerce to be cramped by underwriters. An assured was to conduct his trade his own way, with this exception, that it does not materially vary the risk insured. Barter, for the facilitation of the voyage, was allowable without express stipulation. The question was, if the use made of the ship had the voyage for its object. The jury found a verdict for the defendant.

ENGLISH NOTES.

The rule is also illustrated by several of the cases cited under Nos. 3 & 4, particularly by *Williams v. Shee*, p. 376. *supra*.

Mount v. Larkins (1831), 8 Bing. 108, 1 M. & Scott. 165, was an action upon a policy on ship "at and from Sincapore to the ship's port of discharge in Europe." The policy had been effected while the ship was on her outward voyage to Sincapore, and it was found by the jury that there had been unreasonable and unjustifiable delay between the making of the policy and the commencement of the risk intended to be insured against. TINDAL, C. J., after citing the principal case, said: "If the principle be sound, where the delay takes place after the risk has actually commenced, in reason and sense it applies also to the case of the voyage insured, where the risk is not to commence until the completion of the outward voyage. The reason upon which a deviation discharges the insurer is not that the risk is thereby increased, but because the insured has, without necessity, substituted another voyage for that which was insured, and thereby varied the

No. 7. — *Hartley v. Buggin.* — Notes.

risk which the underwriter took upon himself. It must be admitted that, if the policy had been effected upon this ship 'at and from Singapore' the ship then being at Singapore, unreasonable and unjustifiable delay at Singapore would have avoided the policy. Why, but because the voyage commenced after an unreasonable interval of time would have become a voyage at a different period of the year, at a more advanced age of the ship, and, in short, a different voyage than if it had been prosecuted with proper and ordinary diligence; that is, the risk would have been altered from that which was intended by all parties when the policy was effected." Judgment was accordingly given for the defendant.

In *Hamilton v. Sheddon* (1837), 3 M. & W. 49, M. & H. 334, the action was on a policy of insurance on goods by ship *C.*, "at and from Liverpool to any port or ports, &c., on the coast of Africa, &c., during her stay and trade on said coast, &c., and at and from thence to her port of discharge in the United Kingdom, with leave to call at all ports and places backwards and forwards, &c., for any purpose, &c., particularly with liberty of transship on board any vessel or craft in the same employ or otherwise, &c." And by a memorandum under the policy it was especially agreed that the said vessel might be employed or used as a tender to any other vessel or ship in the same employ. The ship *C.* was kept for thirteen months at Benin where she was employed as tender to four other vessels belonging to the plaintiffs. While the ship was thus employed one of those other vessels, the *L.*, struck on the bar; and the cargo of the *L.* was unshipped and put on board the *C.*, which conveyed it with other cargo to Cameroons and there put it on board another vessel of the plaintiffs called the *D.* The judge (COLTMAN, J.) directed the jury that the voyage to Cameroons was a deviation, and also left to the jury the question whether the *C.* had stayed an unreasonable time in the river Benin. The jury answered that question in the affirmative, and gave the verdict for the defendant accordingly. The Court (LORD ABINGER, C. B., PARKE, B., ALDERSON, B. and GURNEY, B.) unanimously upheld the ruling that the voyage to Cameroons was a deviation; and were also disposed to consider that the question of unreasonable time was properly left to the jury, and that the verdict on that ground could not have been disturbed.

In *The Company of African Merchants v. British and Foreign Marine Insur. Co.* (Ex. Ch. 1873), L. R., 8 Ex. 154, 42 L. J. Ex. 60, 28 L. T. 233, 21 W. R. 484, a ship was insured for a voyage to the African coast, "during her stay and trading there," and back, and the ship's stay was prolonged for the purpose of rendering services to another ship for salvage of her cargo, which the plaintiff (the insured)

No. 7. — *Hartley v. Buggin.* — Notes.

had purchased. It was held by the Exchequer Chamber, on a bill of exceptions to a ruling that this constituted a deviation, that the ruling was correct and that the underwriters were discharged. BLACKBURN, J., said: "The principle which governs the case is thus stated in Phillips on Insurance, art. 983: 'It is not necessary to a deviation or change of risk whereby the underwriters are discharged, that the degree or period of the risk should be thereby increased. The assured has no right to substitute a different risk. . . . If this vessel had been used for some purpose recognised in the coasting trade as a trade purpose,' I by no means wish to be understood to say that there would then have been a deviation, although such a use of her would not come within the ordinary meaning of the word 'trade.' But where there is a real change of risk by the employment or detention of the ship for some purpose wholly foreign, the underwriter has a right to say,

I never undertook this risk. *Non hæc in foedera veni.*' This proposition is entirely borne out by the case of *Hartley v. Buggin*, where Lord MANSFIELD, C. J., says: 'It is not material to constitute a deviation that the risk should be increased.'"

The last mentioned case was distinguished by the Court of Exchequer Chamber in *Gambles v. Ocean Marine Insurance Company of Bombay* (C. A. 1875), 1 Ex. D. 141, 45 L. J. Ex. 366, 34 L. T. 189, 24 W. R. 384, where a vessel insured "from P. to Newcastle-on-Tyne and for fifteen days whilst there after arrival," had arrived safely at Newcastle, discharged her cargo, and then moved to another place within the port to take in cargo for a voyage under a new charter-party, and while so moored and within fifteen days after arrival was damaged by a storm. The Court of Appeal, reversing the judgment of a majority of the Court of Exchequer, construed the policy as not simply a voyage policy but a voyage policy with a time policy engrafted on it; and held that such time policy covered a loss within the port during the fifteen days without reference to the nature of the employment of the ship there.

AMERICAN NOTES.

The principal case is cited by Barber on Insurance, sect. 117, and fortified by reference to *Upton v. Salem Ins. Co.*, 8 Metcalf (Mass), 605; *Settle v. St. Louis P. I. Co.*, 7 Missouri, 379; *Arnold v. Pacific M. I. Co.*, 78 New York, 7. In the Massachusetts case, the vessel discharged at Monte Video, excepting a few bundles of shingles, and there she took on merchandise intended for another vessel of the same owner, then lying at Buenos Ayres, and proceeding thitherward was lost. Held, that there could be no recovery if the cargo was substantially discharged at Monte Video, and this was a question for the jury. Citing *Moore v. Taylor*, 1 Ad. & Ell. 25. "If it was so discharged, we are of opinion that the voyage insured was thereby terminated, according to

No. 8. — *Phillips v. Irving*, 7 Man. & Gr. 325. — Rule.

the true construction of the policy; and that when the brig proceeded to Buenos Ayres she was on a new voyage not protected by the policy." The Missouri case was one of deviation to save property. In the New York case the doctrine of the rule was admitted, adding that "delay not expressly prohibited by the policy, for a reasonable time, for the purposes of the adventure, must always in such cases be allowed."

No 8. — PHILLIPS *v.* IRVING.

(C. P. 1844.)

RULE.

DETENTION for a reasonable time for the purpose of the adventure insured does not constitute deviation; and, where a seeking ship is waiting at an authorised port, for the purpose of obtaining a cargo at a reasonable amount of freight, the question whether the time is reasonable or not must be determined, not by any positive and arbitrary rule, but by the state of things existing at the time at that port.

Phillips v. Irving.

7 Manning & Granger, 325-329 (s. c. 8 Scott N. R. 3; 13 L. J. C. P. 145).

Insurance. — Deviation. — Detention for Reasonable Time for purpose of Voyage.

[325] In a policy on a seeking ship, a detention for a reasonable time for the purposes of the seeking adventure must be allowed: and whether the time is reasonable is to be determined by the state of things at the port where the ship happens to be.

A ship insured, with liberty to touch, stay, and trade at several ports, arrived at one of them on the 3d of June when some necessary repairs were done to her. On the 2d of September she was ready to take in cargo, but, owing to the state of the freight-market and other difficulties, no cargo was put on board till the 10th of January following: *Held*, that the delay was not unreasonable, so as to amount to a deviation.

Assumpsit, upon a policy of assurance, dated the 29th of January, 1842, signed by the defendant as chairman of the Alliance Marine Insurance Company, on the ship *Broxbournebury*, at and from London to Bombay, and thence to China, and back to the United Kingdom, with liberty to touch, stay, and trade at all ports and places on this side, at or beyond the Cape of Good Hope.

No. 8. — *Phillips v. Irving*, 7 Man. & Gr. 325, 326.

First plea, that the ship, having arrived at Bombay, remained there an unreasonable time; and that the assured did not duly prosecute the voyage insured, and therefore were guilty of a deviation.

Replication, *de injuriâ*.

There were other pleadings in the cause, but they were not material to the question now raised.

At the trial before TINDAL, C. J., at the sittings for London after last term, it appeared that the ship arrived at Bombay on the 3d of June, 1842; that some repairs were necessary, which were completed on the 2d of September; and that the ship was then ready to take in cargo; but that in fact none was put on board until the 10th of January, 1843. The ship was a seeking ship, commanded by one of the part-owners; and it was clearly proved that he could not at an earlier period have obtained a cargo, either for China or the United Kingdom, at a remunerating freight. Several circumstances combined to render freights unusually low at Bombay during the time that the ship in question remained * there. Ships that had taken out troops were in [* 326] want of homeward cargoes, and the disturbance of the trade with China had prevented many ships from sailing thither from Bombay. The latter port was therefore crowded with shipping; and the freights offered would, if accepted, have occasioned a great loss to the owners.

The ship sailed for London on the 22d of March, 1843, but was compelled, from stress of weather, to put in at the Mauritius, when she was found to be so much damaged as not to be worth repairing, and she was consequently abandoned. *Benson v. Chapman*, 6 Man. & Gr. 792.

It was agreed that it should be reserved for the Court to determine upon the facts applicable to the first issue, whether there had been such an unreasonable delay as to discharge the underwriters, and a verdict was returned for the plaintiff with £887 damages, leave being reserved to the defendant to move to enter a nonsuit, or a verdict for himself.

Channell, Serjt., now moved accordingly, and submitted that the delay at Bombay was unreasonable, and amounted to a deviation. [CRESSWELL, J. The *Broxbournebury* appears to have been a seeking ship. The usual course in such a voyage is, that the captain is to do what is reasonable for the owners; and the

No. 8. — *Phillips v. Irving*, 7 Man. & Gr. 326-328.

underwriters subscribe to that risk. *Metcalf v. Parry*, 4 Camp. 123 (15 R. R. 734)].¹ The delay here is accounted for, partly by the necessity for certain repairs, partly by the state of the market; but the underwriters are not to be made liable in respect of the latter. [TINDAL, C. J. The question is, whether the captain waited an unreasonable time with reference to the state of the market; and if he did not, whether the underwriters did [* 327] not take the risk.] The delay arose from *an unusual state of circumstances. The policy was entered into with reference to the ordinary state of things. The owners might have made a time policy. [TINDAL, C. J. The captain has authority under the policy "to touch, stay, and trade." It is clear he stayed in this case for the purpose of trade. The question must be whether he did so for a reasonable time. CRESSWELL, J. How are we to know what is the ordinary state of trade at Bombay?] It is clear from the evidence that the circumstances proved were not usual. [TINDAL, C. J. I will show my notes to my brothers, and we will see if the rule ought to go. CRESSWELL, J. It is a very important question to persons engaged in the African trade, where the circumstances vary much.²]

The learned serjeant referred to *Mount v. Larkins*, 8 Bing. 108, 1 M. & Scott, 165. *Cur. adv. vult.*

TINDAL, C. J., on the following day delivered the judgment of the Court.

In this case we are of opinion that a rule for entering a nonsuit, or a verdict for the defendant on the first issue, ought not to be granted. (His lordship then stated the pleadings, *ut supra*.)

At the trial, the facts applicable to the first plea (which is the only one on which any question is raised) were withdrawn from the consideration of the jury, and it was agreed that the Court should decide whether the assured were discharged by the alleged delay. We have, therefore, read the evidence given by [* 328] the captain *and his mate as to the circumstances under

¹ Where it was held that a voyage in a policy, "with liberty to touch at," was a seeking adventure.

² In *Phillips on Insurance* (Boston, 1840), it is said, "In some voyages however, it is customary to prolong the risk by touching at intermediate ports; as in India voyages, or others of great length;

or by delaying to discharge the cargo immediately after arrival, as in voyages to the coast of Labrador, or of Africa; and the parties are supposed to be acquainted with such custom, and have it in contemplation when they make their contract." Vol. i. p. 480.

which the ship remained at Bombay. (His lordship stated the evidence, *ut supra*.)

There was nothing to show that, as far as the interests of the owners were concerned, the delay at Bombay was improper. But it was contended, that, although the adventure on which the ship sailed from England may have been prosecuted without any improper delay, as far as the owners were concerned, yet, with regard to the underwriters, the case was different, and the delay was unreasonable and improper, and therefore equivalent to a deviation; and that, as the concurrence of circumstances which rendered freights at Bombay ruinously low, was unusual, it could not be said that the voyage was prosecuted in the usual course. It was not, nor could it be, denied that the ship might be detained for some time in order to obtain a cargo at a reasonable rate of freight: but it was said that such detention could not, without discharging the underwriters, be extended beyond the time usually required for such purpose. It appears to us, however, that no such rule can be laid down; that the detention, for a reasonable time for the purposes of the adventure insured, must be allowed; and that, whether the time is reasonable or not, must be determined, not by any positive and arbitrary rule, but by the state of things existing at the time at the port where the ship happens to be. It may be collected from numerous cases, that delay before or after the commencement of a voyage insured, is not equivalent to a deviation, unless it be unreasonable. *Hartley v. Buggin*, 3 Dougl. 39, Park, Ins. 313, 652 (p. 391, *ante*); *Ougier v. Jennings*, 1 Camp. 505 n. (10 R. R. 739 n.), *Mount v. Larkins*, 8 Bing. 108, 1 M. & Scott, 165. And we think that no certain and fixed time can be said to be a reasonable or unreasonable time for seeking a cargo in a foreign port; but that the time allowed must

* vary with the varying circumstances which may render it [* 329] more or less difficult to obtain such cargo. Judging of the facts of this case according to that principle, it does not appear to us that the delay at Bombay was unreasonable. We therefore think that the verdict found for the plaintiffs ought not to be disturbed.

Rule refused.

ENGLISH NOTES.

“Where a ship is insured at and from a place, and it arrives at that place, as long as the ship is preparing for the voyage upon which it is insured, the insurer is liable; but if all thoughts of the voyage are laid

No. 8. — Phillips v. Irving. — Notes.

aside, and the ship lies there five, six, or seven years, with the owners' privity, it shall never be said that the insurer is liable, for it would be very absurd to make him suffer for the whim or caprice of the owner, who chooses to let the ship lie and rot there." *Per* Lord HARDWICKE, *Chitty v. Selwyn* (1742), 2 Atk. 359.

In *Smith v. Surridge* (1801), 4 Esp. 25, 6 R. R. 837, the insurance was on ship "at and from Pillau to London." The ship was delayed for necessary repairs and afterwards by the difficulty in getting over the bar. It was held that the delay was reasonable.

In *Grant v. King* (1803), 4 Esp. 175, 6 R. R. 849, the insurance made in August, 1789, was from Brest to London. The ship sailed in March following. The delay was explained by the difficulty of getting American sailors who were necessary to man the ship for the purposes of the voyage. Lord ELLENBOROUGH said that to discharge the policy there must be a clear imputation of waste of time. Mere length of time elapsing between the sailing of the vessel and the underwriting of the policy, is not of itself sufficient to avoid the policy. He left the case to the jury, who found a verdict for the plaintiff.

Schroder v. Thompson (1817), 7 Taunt. 462, 18 R. R. 540, was an action upon a policy of insurance on ship "at and from London to the ship's loading port or ports in Virginia, and back to London with liberty to touch at St. Ubes." The ship sailed from London in ballast, shipped a cargo of salt at St. Ubes, and therewith arrived at Norfolk in Virginia on 30th January, 1808. She finished discharging on 27th February, and there remained until an embargo existing at the time of her arrival was taken off and afterwards to load a cargo. She set sail for London with her homeward cargo on the 13th August, 1809, and was lost at sea. The jury found that she had acted reasonably, and the underwriters were held liable.

In *Bain v. Case* (1829), 3 Car. & P. 496, M. & M. 262, a ship was insured "at all or any ports and places in the Northern and Southern Pacific Ocean, Rio Janeiro," &c. The ship had remained one hundred and nine days at the port of St. Blas. It was explained by the captain that he stayed in the hope of getting permission to land his cargo, as negotiations were pending with the government there for permission to him to do so. Lord TEXTERDEN ruled that it was a question of fact whether it was an unreasonable time. The jury found for the plaintiff, finding in effect that it was not unreasonable.

AMERICAN NOTES.

The principal case is cited by Barber on Insurance, sect. 117.

In *Oliver v. Maryland Ins. Co.*, 7 Cranch (U. S. Supr. Ct.), 487, it was held (MARSHALL, C. J., giving the opinion), that the danger which would

No. 8. — *Phillips v. Irving.* — Notes.

justify remaining in port a long time must be obvious, immediate, directly applied to the interruption of the voyage, and imminent, not distant, contingent and indefinite: and that if usage warrants the vessel in going from port to port to collect her cargo, and she exhausts all the customary time at one port, she cannot go to another without being guilty of such a deviation as will vitiate the policy. This decision was cited by STORY, J., in *Columbian Ins. Co. v. Catlett*, 12 Wheaton (U. S. Supr. Ct.), 389, where it was held that a delay from March 21 to May 30, to sell cargo, was not in the circumstances unreasonable; that much depends upon the usages of trade at the port: and that where different ports are to be visited for that purpose, the owner may limit the selling price to a reasonable extent, and delay caused thereby in good faith does not constitute a deviation. "The parties, in entering into the contract of insurance, are always supposed to be governed in the premium by the ordinary length of the voyage and the course of the trade. That delay therefore which is necessary to accomplish the objects of the voyage according to the course of the trade, if *bonâ fide* made, cannot be admitted to avoid the insurance." "It may be a very justifiable delay to wait in port and sell by retail, if that be the course of the business," &c. This decision was cited in *Arnold v. Pacific M. Ins. Co.*, 78 New York, 16, 17, where the Court said: "It is only however an unreasonable or unexcused delay, that is, a voluntary and unnecessary waste of time, that will amount to a deviation; if justified by necessity or incurred *bonâ fide*, with a view to the purposes of the voyage insured, the underwriter will not be discharged by the delay, although its absolute duration may be very considerable." Citing *Grant v. King*, 4 Esp. 175. "Delay not expressly prohibited by the policy, for a reasonable time, for the purposes of the adventure, must always in such cases be allowed; and whether the delay be reasonable or not, must be determined, not by any positive or arbitrary rule, but by the state of things existing at the time." Something to the same purport is *Augusta Ins., &c. Co. v. Abbott*, 12 Maryland, 348, where delay in starting on the voyage from Nov. 19 to Dec. 22 was held fatal unless excused. Kent says (3 Com., * 315), that the voyage must "be performed with reasonable diligence," and "every unnecessary delay, in or out of port, or in commencing the voyage insured against, will amount to a deviation."

In *Earl v. Shaw*, 1 Johnson Cases (New York), 314: 1 Am. Dec. 117, a delay for six months in port, not shown to have been fraudulent or varying the risk, was held not a deviation, the voyage insured being to India.

No 9. — LAWRENCE v. SYDEBOTHAM.

(K. B. 1805.)

RULE.

PERMISSIONS involving leave to deviate must be construed strictly so as not to extend their force beyond the plain meaning of the words in relation to the subject-matter and the intention of the parties as collected from the whole of the document.

A policy of insurance on a voyage “with or without letters of marque,” and with leave “to chase, capture, and man prizes,” does not authorise the assured after a capture to shorten sail in order to let the captured vessel keep up with him, and to convey her into port for condemnation.

Lawrence v. Sydebotham.

6 East, 45-55 (s. c. 2 Smith, 214; 8 R. R. 385).

Insurance. — Deviation. — Permission strictly Construed.

[45] A policy of insurance on a ship on a certain commercial voyage, with or without letters of marque, giving leave to the assured to chase, capture, and man prizes, however it may warrant him in weighing anchor while waiting at a place in the course of the commercial voyage insured, for the purpose of chasing an enemy who had before anchored at the same place in sight of him, and was then endeavouring to escape, will not warrant him after the capture, and in the course of the further prosecution of the voyage, in shortening sail and lying-to, in order to let the prize keep up with him for the purpose of protecting her as a convoy into port, in order to have her condemned, though such port were within the voyage insured.

This was an action on a policy of insurance on the ship *Tamer*, with or without letters of marque, valued at £6000, and on slaves and goods as interest might appear, “at and from Liverpool to the coast of Africa, during her stay and trade there; and at and from thence to her port or ports of sale, discharge, and final destination in the British and foreign West Indies and America, with leave to chase, capture, and man prizes.” The plaintiff declared upon a loss by the perils of the seas: to which the general issue was pleaded. The cause was tried before GRAHAM, B., at the last

Lancaster assizes; and the material question now was, Whether the policy were avoided by a deviation in the course of the voyage? As to which it appeared in evidence that the ship sailed from Liverpool upon the voyage insured, and arrived on the 14th of August, 1803, off the entrance of the Congo River, on the coast of Africa, where she found *La Braave*, a French trading vessel, with a brig and tender, and anchored within six miles distance of them. The next morning the *Tamer* got under weigh, and came within three miles of the French vessel; which soon after stood out to sea, and was pursued for about 30 miles, and engaged and captured by the *Tamer*, which carried 18 guns. After this the *Tamer* returned to the coast of Africa, with her prize, and finished her trading there, and proceeded, on the 15th of October, with her cargo and the prize in company, on her voyage to the West Indies, in the course of which she leaked very considerably, and after making more and more water from time to time, she finally *foundered at sea; and the crew were saved by the [*46] prize, *La Braave*, which kept her company all the voyage till she sunk. On this point the captain deposed at the trial that he received instructions from his owners before the voyage to take any ship he might capture under his protection; in consequence of which he continued with his prize, and not with a view of receiving from her any protection against the risk of the leak of his own ship. That several times during the voyage he shortened sail and lay to, in order to give the prize time to come up, and in order to keep company with her; and particularly on one occasion, when the prize had carried away her fore-topmast. It was objected by the defendant's counsel that the ship had deviated from the voyage insured, in two respects; 1st, In weighing anchor off the mouth of the Congo River, for the sole purpose of pursuing and taking the prize; 2dly, In shortening sail during the voyage to the West Indies, for the purpose of convoying the prize; neither of which, it was contended, was warranted by the liberty given in the policy "to carry letters of marque," and "to chase, capture, and man prizes." But the learned Judge's opinion inclining in favour of the plaintiff upon the construction of the policy in both respects, he directed the jury accordingly; and they found a verdict for the plaintiffs.

The letters of marque recite an order by the King in Council, "That all ships that shall be commissioned by letters of marque

No. 9. — *Lawrence v. Sydebotham*, 6 East, 46-48.

and general reprisals, &c., shall and may lawfully seize and take the ships, vessels, and goods belonging to the French Republic, &c., and bring the same to judgment in the High Court of

Admiralty, within the King's dominions, for proceedings [*47] and adjudication and *condemnation to be thereupon had,"

&c. : and then reciting that the captain of the *Tamer* had "given sufficient bail, with sureties, to the King in the High Court of Admiralty, according to instructions made the 17th of May, 1803, a copy of which was given to" the captain, it proceeds to authorize the captain to set forth the ship *Tamer* in a warlike manner, to seize and take the ships, &c., of the French republic, &c., "and to bring the same to such port as shall be most convenient, in order to have them legally adjudged in the High Court of Admiralty of England, or before the judges of such other Admiralty Court as shall be lawfully authorized within the King's dominions: which ships, &c., being finally condemned, it shall be lawful for the captain to dispose of them," &c.

The instructions therein referred to contain clauses of the same import for seizing and taking the enemy's ships, and for bringing them into such port of England or some other port of the King's dominions as shall be most convenient for the captors, in order to have the same legally adjudged. And article 3 directs, "That after such ships, &c., shall be taken and brought into any port, the taker, or one of the chief officers, or some other person present at the capture, shall be obliged to bring or send, as soon as possibly may be, three or four of the principal of the company (whereof the master and mate, or supercargo, to be always two) of every ship so brought into port before the Judge of the Admiralty, &c., to be examined upon interrogatories concerning the interest and property of such ship," &c. Art. 5 directs, "That if any ship, &c., of the King or his subjects shall be found in distress, or taken by the enemy, &c., the commanders, &c., of such merchant

ships as shall have letters of marque and reprisals, shall [*48] use their best endeavours to succour and free the *same,"

&c. ; and by art. 11 and 14, "If any commander of a ship, having a letter of marque and reprisals, shall act contrary to these instructions, he shall forfeit his commission, and, together with his bail, be proceeded against according to law, and be condemned in costs and damages, and be severely punished," &c. ; and by art. 15, "Security and bail are to be taken in £1500 for a vessel of this description."

No. 9. — Lawrence v. Sydebotham, 6 East, 48, 49.

In Michaelmas Term last an application was made, and rule *nisi* granted, for setting aside the verdict, and granting a new trial, on the ground of the two deviations insisted upon at the trial. Against which

Park, Topping, and Wood now showed cause. This case is distinguishable from *Parr v. Anderson*, now in judgment,¹ for here there is not only permission given to carry letters of marque, but an express liberty to "chase, capture, and man prizes." This necessarily includes a liberty to deviate for those purposes when in sight at least of an enemy or a vessel supposed to be such. 1. A liberty to chase must include every act necessary for chasing, such as the weighing anchor was, in this case, where both the captor and her prize were previously lying at anchor near to each other. The anchor was not weighed, nor the ship carried out to sea upon a cruise to look for prizes, but the whole was done in the actual chase of a prize before in sight, and endeavouring to escape. Then, 2dly, The captor was warranted by the directions of his letters of marque and instructions, to accompany his prize to a port where she might be condemned; for that is necessary, *in order to perfect the capture which he was at [*49] liberty to make. Such a liberty includes every act necessary or proper to give it effect, which either the general marine law or the laws of the captor's country enable him to do. When letters of marque are taken out, it is no longer optional to capture enemy's property or not which is within the belligerent's power to do; the master binds himself under a penalty to capture or destroy the enemy's ships whenever he can; and in case of capture, he is directed to take his prize into port, in order to have it legally adjudged. Then when liberty is given to carry letters of marque, the underwriter virtually consents to incorporate in the policy all the directions contained in them and in the accompanying official instructions. The captor cannot insure the possession of his prize so well as by keeping her company on the voyage; and he thereby also adds to the security of his own ship. The act done is for the benefit of the underwriter as well as of all other parties concerned in the safety of the ships and crews. The shortening sail was, therefore, no more than a necessary act for insuring the safety of the prize, and ultimately of the captors

¹ Judgment was delivered in this case on a subsequent day of the Term, 6 East, 202 (8 R. R. 461), when a new trial was awarded.

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themselves. If a ship were to shorten sail, in order to relieve another in distress, that could not be deemed a deviation; and this was done in order to lessen the risk of distress, and for the purpose of conducting another ship into a place of safety.

Cockell, Serjt., and Littledale, *contra*. The evidence in the case does not support the argument built on a supposed case of distress, which may, perhaps, be an excuse for deviation; for the captain disavowed having shortened sail from any apprehension of danger to his own ship if he left the prize, but that he [* 50] did it solely for the purpose of *protecting his prize according to the instructions which he had received from his owners.

Neither was the prize supposed to be in any danger from the seas. By taking upon him, therefore, to convoy the prize, and in so doing, to delay his own voyage, he plainly increased the risk of the underwriters beyond the terms of the liberty given in the policy, which are to chase, capture, and man. Neither of these include a liberty to convoy. So far as the underwriter's risk is increased by any deviation which happens in chasing and making the capture, that he agrees to; and so far as any delay is incurred in the voyage insured by those acts, or by the act of manning the prize afterwards, he consents to it: but it is a necessary condition implied in every policy, that the ship shall proceed on her voyage with all reasonable expedition: and, therefore, after the delay incurred within the terms of the liberty given by manning the prize, the assured were not entitled to create further delay by convoying the prize. The very liberty given to man the prize, while on the one hand it lessens the force of the captor, supposes that he is not to be encumbered with the further care of it, but that a sufficient number of men will be put on board to navigate and take care of both vessels: and the owner who knows the nature of the adventure, and that he may be required to draft off some of the crew, is bound to provide for such a contingency, at the risk of his policy if he leave his own ship without a sufficient crew. Neither the commission nor the instructions imply that the captor is to accompany his prize into a port of condemnation, but only that the prize shall be brought; that is, brought by those put on board to take the management of it into port, in order to be adjudged. Whatever liberties, however, may be given to [* 51] deviate or delay for particular purposes, they must be *strictly confined to those purposes; and, subject to those, the prin-

cipal object of the insurance is still the safe prosecution of the voyage insured with all proper and ordinary precautions, and all reasonable despatch: and these collateral licences have always been construed strictly. As where there was a liberty to cruise six weeks it was holden to mean six successive weeks, and not to cover a cruising for that time at intervals. *Sayers v. Bridge*, Dougl. 527. If the captor were at liberty to convoy every prize into port, the voyage might be indefinitely prolonged by his making successive captures before he reached his ultimate destination. It might be even considered to be most convenient to return with every prize to the port from whence he sailed.

Lord ELLENBOROUGH, C. J. The question is reduced to this:—Whether acting as convoy to a prize, and slackening sail in the course of the voyage insured, in order to make the rate of sailing of the capturing ship conform to that of the prize, be within the meaning of the terms introduced into the policy, giving the assured “leave to chase, capture, and man prizes”? These terms clearly gave them liberty to do everything of a hostile nature within the scope of them to overcome the resistance, and to take possession of the prize, by sending part of the crew of the captors on board the prize. But liberties of this sort, without giving them an expansion beyond what the parties can be supposed to have contemplated, cannot be extended beyond the plain meaning of the words, as applied to the subject-matter, by adapting them to other circumstances of a voyage known by appropriate terms, and which are not included in the policy. I shall give no opinion at
 * present upon the effect of the general leave to carry letters [*52] of marque; it is enough to say, that in this case the parties themselves to the contract have defined what their own meaning was, — namely, to “chase, capture, and man prizes:” and upon the principle that, *expressio unius est exclusio alterius*, that will not include a leave to convoy. I would however observe, that the words in the letter of marque which have been most relied on, directing the captor to bring the prize into port to be condemned, does not mean an actual bringing of it in by the master himself, but causing it to be brought into port would fully satisfy those words: that is, by putting a competent number of men on board the prize for that purpose. I must not be understood by this to say, that under such a liberty given to man prizes the captor may divest his own ship of the number of men necessary to conduct

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her safely to her port of destination; but that, under it, he may, without laying himself open to exception on that account, sever some of the men from his crew in order to man the prize. On the short point of the case my opinion is, That a liberty to chase, capture, and man, cannot be extended beyond what is necessary for the performance of those acts: and that the convoying of the prize afterwards does not necessarily arise out of such a liberty. This does not affect the question how far slackening sail, from motives of humanity, to succour another ship in distress, is allowable; nor is it necessary to touch upon it. Perhaps, when such a case does arise, it may be found to be for the general benefit of all insurers (and, amongst others, consequently, for the benefit of those who may raise such an objection) to allow such succour to be given without imputing deviation to the succouring ship. It is not, however, necessary now to give any opinion on that point.

[* 53] In this case the *slackening sail for the purpose of convoying the prize, was a deviation which annuls the policy.

GROSE, J. The question is, Whether the ship insured has done more than she had liberty to do? She had liberty to chase, capture, and man prizes; and she did chase, capture, and man a prize. But it appears that afterwards she pursued her voyage, not in the most expeditious manner that she might have done, but she stopped and delayed her voyage, in order to convoy her prize into port; and thereby increased the dangers of the voyage insured and the risk of the underwriters. Now a liberty to chase, capture, and man, does not imply a liberty to wait for and convoy prize. If it had been so intended, another appropriate expression in daily use would have been used, and leave would have been given in terms to convoy the prize into port. The words alluded to in the letter of marque, *i. e.*, “bring into port,” as applied to this policy, may very well mean “properly manning the prize, in order to bring her into port.” That the dangers of the voyage were increased to the ship insured by convoying the prize, cannot be doubted. It appeared in evidence, that day after day she shortened sail, and thereby protracted the duration of the voyage. This, therefore, not being covered by the liberty given, amounts to a deviation, and avoids the policy.

LAWRENCE, J. I am of the same opinion as to the construction of the policy. What the captain stated at the trial was true, that he did not wait for the prize under any idea that her presence was

necessary to insure his own safety ; but it was in order to give her protection. Then the question is, Whether under a liberty which *extended the rights of the assured beyond the com- [* 54] mon terms of indemnity in the policy, namely, “ to chase, capture, and man prizes,” the assured had a still farther liberty to convoy whatever prize he took ? It is argued that the object of the voyage insured by the policy could not be effected without it : but there is the fallacy ; for though the parties contemplated that the prizes taken were to be brought into port, that was provided for by the liberty to man the prizes : it was not necessary that the capturing ship should itself convoy its prize into port ; it was enough that the captors put a sufficient number of men on board to bring her in : and for this purpose, every ship sailing upon such an adventure should carry a sufficient supernumerary crew, to be able to man its prize, and to retain a proper number of men for itself, — though perhaps the liberty to man prizes may extend so far as to excuse some reduction of the original ship’s crew rather below what they would otherwise have had on board ; for, otherwise, it seems not necessary to stipulate for such a liberty. But this does not extend to give liberty to convoy the prize. As to deviations for the purpose of succouring ships at sea in distress, it is for the common advantage of all persons, underwriters and others, to give and receive assistance to and from each other in distress. But that was not the case here. The prize was in no distress, so as to make it necessary to keep her company on that account ; nor was that the motive of keeping with her. The only accident which befell her was carrying away her top-mast ; which the crew on board replaced without any assistance from the captor’s ship.

* LE BLANC, J. This is not a case where two ships [* 55] kept in company with each other for the sake of mutual protection, or where the one stood in need of humane assistance from the other. Therefore it is not like a case where one ship kept company with, or slackened sail for the purpose of assisting another vessel, which might otherwise be in danger of foundering, and seeing her into a place of safety ; but it is the case of a ship wilfully loitering, and not using that dispatch to arrive at her port of destination, which she might have done, in consequence of previous instructions to convoy into port any ship she might capture. Then, Is that liberty necessarily to be inferred from the

terms of the policy, which authorized the capturing ship to have a letter of marque, and to chase, capture, and man prizes? It appears to me that neither the particular words of the policy, nor the terms and conditions of the letter of marque, nor the instructions given with it, require the capturing ship to convoy her prize into port; but she was only required to put men on board the prize, to carry her into port to be condemned. The ship being shown to have loitered on the voyage, it was incumbent on the assured to show a good reason for it; but the only reason appearing is, that she loitered, in consequence of previous instructions received by the captain from the assured, to keep with his prize and carry her into port; and that is no excuse within the terms of the liberty given by the policy. *Rule absolute.*

ENGLISH NOTES.

It has been shown that the mere fact that a vessel is armed and on a commercial voyage with convoy, does not authorise her to depart from the course on her own account in hopes of prize. *Cock v. Tournson*, cited under Nos. 1 & 2 at p. 361, *supra*. It is not stated by Park that the ship carried letters of marque, but it may be presumed she did.

In the case of *Jolly v. Walker*, cited by Park, vol. 2, p. 630, it appears to have been the opinion of Lord MANSFIELD and a special jury that a vessel so situated may chase an enemy actually coming within sight. The insurance was on goods and ship (*Mary*) from London to Cork and the West Indies, and the ship was warranted to proceed on that voyage with 60 men and 22 guns. The *Mary* sailed with letters of marque against French, Spaniards, and Americans, and was ordered out to cruise, but in the event of meeting or coming in sight of any ship belonging to the enemy she was to chase and make prize of the enemy's ship if in her power. Having sighted a strange sail at midnight she gave chase, but at one o'clock, both being hauled close to the northward, the chase was lost sight of. The *Mary* continued standing to the northward, and at 5 A. M. saw the same vessel (who proved to be a Spaniard) on her lee-bow, when she renewed the chase and engaged. Ultimately the Spanish vessel sheered off leaving the *Mary* disabled. The *Mary* then resumed her course to the westward and was taken by an American privateer. It was agreed on all hands that a ship in such circumstances might not cruise; and several witnesses spoke to the usage and practice of ships which carried letters of marque, to chase an enemy. It was admitted, on the part of the insurers, that if an enemy came in the way, the ship must defend or engage; but contended that if she lost sight of the enemy, that was no longer

No. 9. — *Lawrence v. Sydebotham.* — Notes.

chasing, but cruising. Lord MANSFIELD left it, upon the evidence, to the jury, who found for the plaintiffs.

In *Parr v. Anderson* (1805), 6 East, 202, 2 Smith, 316, 8 R. R. 461, the ship *Mercury* was insured on a voyage expressly in the policy declared to be "with or without letters of marque." While sailing on her course the *Mercury* sighted a strange sail, which proved to be a Spaniard, a quarter of a point on her lee-bow. She altered her course a quarter of a point accordingly, and gave chase for a quarter of an hour, after which she abandoned the chase and resumed her course. Lord ELLENBOROUGH at the trial left it to the jury whether the deviation was for the purpose of hostile capture or defence; that if they were of opinion that it was for the purpose of hostile capture, this being an insurance upon a mere mercantile adventure, he thought that the liberty to carry a letter of marque without more would not justify such a deviation, nor give the assured a liberty of engrafting on a commercial adventure an adventure for hostile capture, and then they should find for the defendant. But if it were for the purpose of defence, *e. g.*, by making a show of confidence in the face of the enemy with a view to deter them from an attack, they should find for the plaintiff. The jury found for the defendant. On argument on a rule for setting aside the verdict on the ground of misdirection, the case of *Jolly v. Walker*, *supra* (which had not been brought to Lord ELLENBOROUGH's notice at the trial), was referred to. Lord ELLENBOROUGH delivering the opinion of the Court distinguished the two cases, on the ground that in *Jolly v. Walker*, while there was no express permission in the policy to carry letters of marque, there was an express warranty that the ship should be armed, showing more strongly than the clause "with or without letters of marque," the intention that the ship should be used as a fighting ship. A new trial was however granted, on the ground that it might be material to ascertain, as a question of fact, in what manner the parties to contracts containing this form of words have acted upon them in former instances, by paying losses, &c., and whether such words have obtained in practice, as between insured and insurers, any definite import.

The sequel is described by Park (Insurance, vol. 2. p. 632), as follows: "This case came on to be tried again before Lord ELLENBOROUGH and a special jury, at Guildhall. From my memory of what passed, having been one of the counsel in it, aided by a note which I have seen, his Lordship was strongly of opinion on the evidence, that this vessel had cruised, which of course, if the jury so thought, would put an end to the question. The jury found for the defendant; and I have no doubt upon that ground, from the evidence of the plaintiff's own witnesses."

No. 10. — *Elton v. Brogden.* — Rule.

In *Jarratt v. Ward* (1808), 1 Camp. 263, 10 R. R. 677, there was a policy on ship “from London to the Southern whale fishery and back again, with leave to carry letters of marque, and to cruise for, chase, capture, man, and *see into port*, any ship or ships of the enemy.” Lord ELLENBOROUGH directed the jury that these words could not justify the ship, after seeing a prize into a port, in waiting there until the prize was repaired so as to be in a condition to be sent to England.

Hibbert v. Halliday (1810), 2 Taunt. 428, 11 R. R. 633, was an action upon a policy of insurance on ship *Port au Prince*, “at and from London to the Southern whale and seal fishery, during her stay there, and back to London, with leave to touch, stay, and trade at all ports and places whatsoever and wheresoever, backwards and forwards, as well on this as on the other side of Cape Horn and the Cape of Good Hope, . . . and with liberty to chase, capture, and man any prize or prizes, and to take and return with or send into port or ports any prize or prizes; also to cruise 31 days, either together or separate, anywhere and in any latitude, on the outward-bound passage on this side of Cape Horn and the Cape of Good Hope.” The ship was lost after leaving Port St. Blas at the other side of Cape Horn, and it appeared that after observing a Spanish ship (the *Santa Anna*) at anchorage off that port, the *Port au Prince* stood off for about 9 days employing her boats in watching the *Santa Anna*, which was then captured by means of one of the boats. It was held that this transaction was not within the liberty to chase, capture, or man, but was a cruising, and having taken place on the other side of Cape Horn, although within the limits of the fishing ground, was a deviation.

No. 10. — ELTON *v.* BROGDEN.

(K. B. 1747.)

RULE.

DEVIATION is excused by unavoidable necessity.

A ship with letters of marque was bound from Bristol to Newfoundland and under orders if she took a prize to put some hands on board the prize and proceed on her voyage. Having taken a prize the crew forced the master to carry the prize back to Bristol, and in doing so the ship was taken. In an action against insurers who insisted that

No. 10. — *Elton v Brogden*, 2 Strange, 1264. — Notes.

this was a deviation, *held* that it was within the excuse of necessity.

Elton v. Brogden.

2 Strange, 1264.

Insurance. — Deviation. — Unavoidable Necessity.

If the sailors force the master to go out of the course of the voyage, [1264] it is not a deviation.

The ship *Mediterranean* went out in the merchants' service with a letter of marque, and bound from Bristol to Newfoundland, insured by the defendant. In her voyage she took a prize, and returned with it to Bristol, and received back a proportionable part of the premium. Then another policy was made, and the ship set out, with express orders from the owners that if they took another prize they should put some hands on board such prize, and send her to Bristol, but the ship in question should proceed with the merchants' goods. Another prize was taken in the due course of the voyage, and the captain gave orders to some of the crew to carry the prize to Bristol, and designed to go on to Newfoundland: but the crew opposed * him, and [* 1265] insisted he should go back, though he acquainted them with the orders; upon which he was forced to submit, and in his return his own ship was taken, but the prize got in safe.

And now, in an action against the insurers, it was insisted that this was such a deviation as discharged them. But the Court and jury held that this was excused by the force upon the master, which he could not resist; and therefore fell within the excuse of necessity, which had always been allowed. The plaintiff's counsel would have made barratry of it; but the CHIEF JUSTICE thought it did not amount to that as the ship was not run away with in order to defraud the owners. So the plaintiff had a verdict for the sum insured.

ENGLISH NOTES.

The principles on which the excuse for deviation on the ground of necessity rests are laid down by Lord MANSFIELD in the case of *Lavabre v. Wilson* (1779), 1 Dougl. 284. The insurance was on the ship *Carnatic* "at and from Port L'Orient to Pondicherry, Madras, and China, and at and from thence back to the ship's port or ports of

No. 10. — *Elton v. Brogden*. — Notes.

discharge in France, with liberty to touch in the outward or homeward bound voyage, at the Isles of France and Bourbon, and at all or any other place or places whatsoever or wheresoever." The *Carnatic*, on leaving Pondicherry, which she had reached after a voyage protracted by bad weather, instead of proceeding to China, sailed for Bengal where she passed the winter and underwent extensive repairs. Early in the following year she returned to Pondicherry where she took in a homeward cargo and sailed for Port L'Orient, but was captured on the voyage thither. The case for the plaintiffs' excusing the voyage to Bengal was rested on the ground of necessity for the safety of the ship, which had suffered damage on the way out which could only be repaired in Bengal. It appeared however that, between Pondicherry and Bengal, the *Carnatic* touched or lay off several ports both on the way to Bengal and on the way back; and although the voyage from Pondicherry to Bengal is usually performed in six or seven days, she took six weeks in going from Pondicherry to Bengal, and about two months on the way back there. After two trials, both of which resulted in verdicts for the plaintiffs, the case came before the Court on a rule for a new trial. Lord MANSFIELD said: "If this application were upon the ground of impeaching the testimony of the plaintiff's witnesses, whatever my private sentiments might be, after two concurrent verdicts, I should not be inclined to interpose. But, without impeaching the evidence, I think there ought to be a new trial, or rather, that the case has been ill-decided. The question is, whether, without imputation on anybody, circumstances have not happened to take the voyage out of the policy. A deviation from necessity must be justified, both as to substance and manner. Nothing more must be done than what the necessity requires. The true objection to a deviation is not the increase of the risk. If that were so, it would only be necessary to give an additional premium. It is, that the party contracting has voluntarily substituted another voyage for that which has been insured. If the voyage to Bengal was unavoidable, where was the necessity to trade? All the ports touched at were out of the direct course, and six weeks and two months were consumed instead of six days."

Driscoll v. Boril (1798), 1 Bos. & P. 313, was an action upon insurance on ship *Timandra*, from Lisbon to Madeira, from Madeira to Safli, and from Safli to Lisbon, — the voyage being the same as that described in the case of *Driscoll v. Passmore*, p. 382, *supra*. The ship having been obliged to return to Lisbon and having proceeded thence to Safli under the circumstances before described, it was held that the deviation was justified by necessity.

In *Scott v. Thompson* (1805), 1 Bos. & P. (N. R.) 181, 8 R. R. 780, the insured ship, a neutral, was carried out of her course by a King's

No. 10. — *Elton v. Brogden*. — Notes.

ship, and, when released, proceeded on the voyage insured. The deviation was held excused by force which is the same thing as necessity.

But where an English merchantman moored at a port, in obedience to the order of the captain of an English man-of-war lying near him, went out to examine a strange sail in the offing, it was held that the deviation was not excused, as there was no necessity laid upon the captain of the merchantman to obey the order. *Phelps v. Auldjo* (1810), 2 Camp. 350, 11 R. R. 725. Lord ELLENBOROUGH at the same time observed that if a degree of force was exercised towards him which either physically he could not resist, or morally as a good subject he ought not to have resisted, the deviation would have been justified.

The endeavour to avoid capture has been held, in numerous cases, a justifying cause of deviation. *Driscoll v. Boril*, *Driscoll v. Passmore*, *supra*; *O'Reilly v. Gonne* (1815), 4 Camp. 249, 16 R. R. 788. So in the following cases upon charter-parties: *The Teutonia* (1872), L. R., 4 P. C. 171, 41 L. J. Adm. 57, 26 L. T. 48, 20 W. R. 421; *The San Roman* (1872), L. R., 3 Adm. 583, 41 L. J. Adm. 72, 26 L. T. 948 (affirmed L. R., 5 P. C. 301, 42 L. J. Adm. 46, 21 W. R. 393), *The Express* (1872), L. R., 3 Adm. 597, 41 L. J. Adm. 79, 26 L. T. 956.

So in time of war, a deviation in order to join convoy is justifiable. *Bond v. Gonsales* (1704), 2 Salk. 445; *Gordon v. Morley* (1747), 2 Str. 1265; *Bond v. Nutt* (1777), 2 Cowp. 601; *Enderby v. Fletcher* (1780), cited 2 Park Insur. 646.

On the other hand in *Blackenhagen v. London Assurance Co.* (1808), 1 Camp. 454, 10 R. R. 729, where the captain of a ship bound from London to a Russian port in the Baltic, on approaching the port, received news of the Russian embargo, and after waiting sometime near the Danish ports, returned with convoy for England and was lost on the way there:—it was held that this was not a deviation but an abandonment of the voyage insured.

“If a ship be driven out of her voyage into any port, and being there, she does the best she can to get at her destination, she is not obliged to return back to the point from whence she was driven.” *Per* Lord MANSFIELD in *Delany v. Stoddart* (1785), 1 T. R. 22, 1 R. R. 139. In this case a ship insured from St. Kitts to London, was driven by a storm off St. Kitts with only part of her cargo taken on board, and was obliged to run into St. Eustatia. She completed her lading there and then sailed for London. This was held no deviation. There was evidence that the ship had endeavoured unsuccessfully to get back to St. Kitts, and also that it is usual where a full cargo has not been taken in at St. Kitts to take in the rest at St. Eustatia. Lord MANSFIELD does not appear to have considered this part of the evidence

necessary to the decision. BULLER, J., however, rests his judgment to some extent on the latter point.

Disablement of the crew by illness may constitute a necessity justifying deviation. In *Woolf v. Claggett* (1800), 3 Esp. 257, 6 R. R. 830, Lord ELDON said that if, by the visitation of God, so many of the crew, who were otherwise sufficient, became so afflicted with sickness as to be incapable of navigating the ship, such an illness of the crew was a necessity which might justify a deviation. As however, in the case in point, the putting into Plymouth, which was the deviation in question, was only for the purpose of procuring medical assistance which ought to have been available on board, the plaintiff was non-suited.

Where, at an early point in the voyage, it is found that the ship is not seaworthy for the voyage, and she puts into a port out of her course to have the defect remedied, it seems clear that this is not a deviation. This will appear from the two cases of *Weir v. Aberdeen* (1819), 2 B. & Ald. 320, 20 R. R. 450, and *Quebec Marine Insurance Co. v. Commercial Bank of India* (1870), L. R., 3 P. C. 234, 39 L. J. P. C. 53, 22 L. T. 559, 18 W. R. 769, in neither of which cases was it suggested that the insurance was determined by reason of deviation. But in the latter case, as it was shown that the defect rendering the vessel unseaworthy existed at the commencement of the voyage, it was held that the implied warranty of seaworthiness was broken, and the underwriter discharged. In the former case the ship had been overladen, and so unseaworthy, at starting, and ABBOTT, C. J., made some observations to the effect that the objection was removed owing to the excess of cargo having been unladen before any loss occurred. But, as it was pointed out in the judgment of the Privy Council in the case of the *Quebec Marine Insurance Co. v. Commercial Bank of India*, these observations cannot be relied on, and the true ground of the decision in *Weir v. Aberdeen* was that the warranty was waived by consent in writing and this waiver would hold good without a new policy being effected.

In *Forshaw v. Chabert* (1821), 3 Brod. & Bing. 158, 23 R. R. 596, referred to in the judgment in *Quebec Marine Insurance Co. v. Commercial Bank of India*, *supra*, a ship insured on a voyage from Cuba to Liverpool (which required a crew of ten men) sailed from Cuba with eight men engaged to navigate to Liverpool, and two engaged for Jamaica. It appeared that her full complement for the voyage was a crew of ten men, but that only eight could be procured in Cuba to sign for the voyage to Liverpool. The captain put into Jamaica to land the two men (who refused to proceed further) and to procure others to take their place. It was held that the vessel, having sailed from Cuba

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without a proper complement of men engaged for the whole voyage, was not, at sailing, seaworthy for the voyage, and the underwriter was accordingly discharged. DALLAS, C. J., while concurring on this ground, puts the alternative that, if the captain had a sufficient crew for the voyage at Cuba, the touching at Jamaica would have been a deviation without necessity.

In *Scaramanga v. Stamp* (C. A. 1880), 5 C. P. D. 295, 49 L. J. C. P. 674, 42 L. T. 840, 28 W. R. 691, the law as to succouring vessels in distress was laid down by COCKBURN, J., in an elaborate judgment in which all the authority to be found in previous English cases — which indeed consists of mere *dicta* — is collected. In aid of the scanty current of English authority he calls in the aid of the American authorities, and deduces, as the result, the following principles: "Deviation for the purpose of saving life is protected, and involves neither forfeiture of insurance nor liability to the goods-owner in respect of loss which would otherwise be within the exception of 'perils of the seas;' and, as a necessary consequence of the foregoing, deviation for the purpose of communicating with a ship in distress is allowable, inasmuch as the state of the vessel in distress may involve danger to life. On the other hand, deviation for the sole purpose of saving property is not thus privileged, but entails all the usual consequences of deviation."

Scaramanga v. Stamp (*supra*) was an action by freighters of cargo under a charter-party against the shipowners for the loss of cargo. The charter-party excepted "perils of the seas," and the defence was that the ship had deviated out of her course and that the loss occurred after such deviation. The facts were that the ship (the *S. S. Olympus*) bound from Cronstadt to Gibraltar, when nine days out sighted another steamship, the *Arion*, in distress, and, on nearing her found that her machinery had broken down, and that she was in a helpless condition. The weather was fine and the sea smooth and there would have been no difficulty in taking off and so saving the crew. But, in order to save the ship as well, the master of the *Olympus* agreed for £1000 to tow the *Arion* into Texel. Having taken the *Arion* in tow accordingly, and on the way to Texel, the *Olympus* got on the sands off the Dutch coast and was lost. There was thus a double deviation, first, by taking the vessel in tow and thus retarding the voyage, and secondly, by going out of her course towards Texel. The Court of Appeal, affirming the judgment of the Common Pleas, held that the deviation was not justified.

AMERICAN NOTES.

It is a general principle that a peril that excuses a deviation must be real and urgent and serious, or there must be reasonable ground for believing it

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to be so, and the deviation must be, or must be reasonably believed to be necessary to avoid the peril. As to danger of capture, *Oliver v. Maryland Ins. Co.*, 7 Cranch (U. S. Sup. Ct.), 493; *Whitney v. Haren*, 13 Massachusetts, 171; *Reade v. Com. Ins. Co.*, 3 Johnson (New York), 352; 3 Am. Dec. 495. Unreasonable apprehension does not justify deviation, such as unreasonable fear of capture. *Riggin v. Patapsco Ins. Co.*, 7 Harris & Johnson (Maryland), 279; 16 Am. Dec. 302. The master of a vessel being advised that French privateers were cruising in the windward passage and in the usual route from Surinam, took the leeward passage to touch at Demmenara to take the protection of a British convoy about to sail, but shortly after arrival was driven to sea by a gale, proceeded on the voyage without convoy and was captured by a French privateer. Held, (KENT, J.) a justifiable deviation: "A deviation, if done to avoid an enemy or to seek for a convoy, is justifiable. It is no deviation to go out of the way to avoid danger. It is in every such case a matter of fact whether the captain acted fairly and *bonâ fide*, according to the best of his judgment, and had no other motive or view but to come home the safest way, or to seek for convoy."

Necessity for repairs, springing from stress of weather, may justify deviation. *Hutton v. Am. Ins. Co.*, 7 Hill (New York), 321; *Turner v. Protection Ins. Co.*, 25 Maine, 515; 43 Am. Dec. 294; *Merchants' Ins. Co. v. Clapp*, 11 Pickering (Mass.), 56.

If a vessel is driven into a port of necessity, and is prevented from pursuing her voyage by pestilence, the policy is not vitiated. *Williams v. Smith*, 2 Caines, 1.

If a vessel is driven from her destined port by blockade and is lost on her way to another, this is no deviation. *Robinson v. Marine Ins. Co.*, 2 Johnson (New York), 89. So where a vessel is compelled to anchor in a port not described in the policy, by military power of a belligerent: *Savage v. Pleasants*, 5 Binney (Penn.), 403; 6 Am. Dec. 424, distinguishing several English cases, and *Richardson v. Maine Ins. Co.*, 6 Massachusetts, 102; 4 Am. Dec. 92; which last holds that mere notice of blockade does not justify the deviation within the words "restraints" and "detainments of princes."

So where a vessel was driven by stress of weather into a port, and might have been repaired there, but proceeded for repairs to a neighbouring port where the owner lived, this is not a deviation. *Silloway v. Neptune Ins. Co.*, 12 Gray (Mass.), 73.

Deviation is excused to save human life or relieve human suffering. Cases cited in note, 38 Am. Dec. 674. As to procure medical attendance for the captain's wife in case of an accident to her: *Perkins v. Augusta, &c. Ins. Co.*, 10 Gray (Mass.), 312; 71 Am. Dec. 651. Or to procure necessary provisions. *Kettell v. Wiggin*, 13 Massachusetts, 68 (unless produced by the master's negligence.) "It makes no difference whether the object of such departure is to alleviate the distress and administer to the necessities of persons who are lawfully on board, or of strangers suffering from disasters sustained by the loss or wreck of another vessel. The dictates of humanity are as forcible in the one case as in the other, and it would be strange and unreasonable if the law recognized any discrimination between them." *Ibid.*

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But it is equally well settled that a deviation merely to save property not on board the insured vessel will not be excused. See cases in note, 71 Am. Dec. 674. As where the vessel insured sailed from its port of destination in pursuit of a vessel which had been carried away by pirates: *Hood v. Nesbit*, 2 Dallas (U. S.), 137; 1 Am. Dec. 265. It was held however to the contrary in *Settle & Bacon v. St. Louis P. Ins. Co.*, 7 Missouri, 379, the case of a voyage on the Mississippi, where deviation to succour another vessel in distress was justified although no life was in danger. Followed, *Walsh v. Homer*, 10 *ibid.* 6; 45 Am. Dec. 342.

A vessel insured to either or both of two ports, and prevented from going to the first port mentioned, may go to a third to ascertain to which of the two it would better sail. *Clark v. United, &c. Ins. Co.*, 7 Massachusetts, 365; 5 Am. Dec. 50.

DILAPIDATIONS.

No. 1. — WISE *v.* METCALFE.

(K. B. 1829.)

RULE.

AN ecclesiastical person who has a freehold in his preferment, is liable for dilapidations. This obligation extends to the maintenance, restoration, and re-building of the structure, according to the original form, but not to anything in the nature of ornamentation.

Wise v. Metcalfe.

10 Barn. & Cress. 299-316 (s. c. 5 M. & R. 235).

Ecclesiastical Dilapidations. — Deceased Incumbent. — Liability of his Estate.

An incumbent of a living is bound to keep the parsonage-house and [299] chancel in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; but he is not bound to supply or maintain anything in the nature of ornament, such as painting (unless that be necessary to preserve exposed timber from decay), and whitewashing and papering; and in an action for dilapidations against the executors of a deceased rector by the successor, the damages are to be calculated upon this principle.

Action on the case by the plaintiff, as rector of the church of the parish of Barley, in the county of Hertford, against the

No. 1. — *Wise v. Metcalfe*, 10 Barn. & Cress. 299, 300.

defendant, as the executor of the late rector, William Metcalfe, the immediate predecessor of the plaintiff, to recover the amount of the dilapidations of the rectory-house, barns, stables, and outbuildings thereto belonging, of the said rectory, and of the chancel of the said church, which had arisen at the time of the death of the said William Metcalfe. At the trial before GARROW, B., at the summer assizes for Hertford, 1828, the jury found a verdict for the plaintiff, damages £399 18s. 6*d.*, subject to the opinion of this Court upon the following case:—

The deceased, William Metcalfe, became rector of the church of the said parish in 1814, and soon afterwards received from the personal representative of his immediate predecessor the sum of £115, being the amount of the dilapidations of the rectory-house, outbuildings, and chancel, at the death of his said predecessor. Mr. Metcalfe continued to be rector until his death, which happened on the 16th of May, 1827, at which period the annual value of the said rectory was £600, out of which the sum of £46 was payable annually for land-tax. In the month of July, 1827, the plaintiff became the rector of the church of the said parish, and has so continued ever since. The rectory-house is an ancient

structure, built with timber, and plastered on the out-
[* 300] side, and has upon it the date of *1624. The barns were

also old, but not of equal age with the rectory-house. The dilapidations of the rectory-house, barns, stables, outbuildings, and of the chancel of the church amounted to £399 18s. 6*d.*, provided the principle upon which the estimate had been made was correct. The principle was, that the former incumbent, William Metcalfe, ought to have left the rectory-house, buildings, and chancel, in good and substantial repair; the painting, papering, and whitewashing being in proper decent condition for the immediate occupation and use of his successor; that such repairs were to be ascertained with reference to the state and character of the buildings, which were to be restored where necessary, according to their original form, without addition or modern improvement. It was proved by the several surveyors of experience examined on the part of the plaintiff, and also of the defendant, that they had invariably estimated the dilapidations between the incumbent of a living and the representatives of his predecessors upon the above principle.

If, however, the rectory-house, buildings, and chancel were to

No. 1. — *Wise v. Metcalfe*, 10 Barn. & Cress. 300–302.

be repaired in the same manner only as buildings ought to be left by an outgoing lay tenant, who is bound by covenant to leave them in good and sufficient repair, order, and condition, the expense of such reparations amounted to £310, the painting, papering, and whitewashing not being included in the last estimate.

And if the former incumbent, William Metcalfe, was only bound to leave the rectory-house, buildings, and chancel wind and water tight, or in that state of reparation which an outgoing lay tenant of premises not obliged by covenant to do any repairs, ought to leave them, then the expenses of repairing the rectory, buildings, and chancel amounted to £75 11s.

* The question for the determination of the Court is, [*301] which of the above principles of valuation is the correct one; and according to their decision the damages will stand for £399 18s. 6d., or be reduced either to £310 or to £75 11s. The case was argued on a former day during these sittings, by

Brodrick for the plaintiff. The principle first stated in the case is that upon which the estimate ought to be formed. The action for dilapidations is founded on the custom of England, which is the common law; by that custom the incumbent of a living is bound to leave the premises in the same state of repair as he ought to keep them in. The custom is thus described in Degge's *Parson's Counsellor*, p. 138, pl. 94.: "Omnes et singuli prebendarii rectores, vicarii regni Angliæ pro tempore existentes, omnes et singulas domos et edificia prebendarum, rectoriarum et vicariarum suarum reparare et sustentare, et ea successoribus suis reparata et sustentata dimittere teneantur." That shows that they must be left to the survivor in the state in which the predecessor ought to keep them. By a legatine constitution of Cardinal Othobon, promulgated A.D., 1268, 52 H. 3, it is ordered that none through covetousness may neglect the house, nor suffer it to go into ruin or dilapidation. *Gibbs. Cod. Jus. Eccl.* 751.

Lyndewood, in his comment upon this constitution, and [302] upon the words "prout indignerint" says, "necessarium refectionem importat; non ergo loquitur hic de refectione preciosæ picturæ Parrhasii vel Apellis, immo nec de aliis voluptuosis impensis."¹ But it appears from the expression "studeant" that some pains are to be taken that decent and respectable repairs be

¹ Lyndewood's *Provinciale*. Constitutio Othoboni, tit. 17, *De Domibus ecclesiarum reficiendis*, p. 112. Ed. Oxon.

done. Dilapidations are such repairs and renovations as are proper to make the house habitable with decent convenience, respect being had to the value of the benefice to which the house belongs. Gibson, in the Codex, Appendix, 1554, under the head of directions in order to a parochial visitation, among the matters to be inspected mentions the mansion-house of the rector, and other houses, buildings, &c., thereto belonging, and the direction as to them is, "that all of them be kept in good and sufficient repair; and particularly that the mansion or dwelling-house (over and above the repairs which are deemed necessary) be kept in such decent manner as is suitable to the condition of the rector, vicar, or curate," and he refers to the words of Othobon's Constitution, "*reficere studeant condecenter.*" Here the rector had from his rectory an income of £600 per annum; he ought, therefore, to have kept the premises in a state of repair, even as to painting, papering, and whitewashing, befitting for the occupation of a man of that income. In Godolphin's Repertorium, 176 edit. 1689, it is stated that by the injunctions of King Edward the Sixth to all his clergy, it is required that the proprietors, parsons, vicars, and clerks, having churches, chapels, or mansions, shall yearly bestow upon the same mansions or chancels of their churches, [* 303] *being in decay, the fifth part of their benefices, till they

be fully repaired, and the same so repaired shall always keep and maintain in good estate. The authorities establish that, by common law, the executors of a deceased incumbent are liable for dilapidations, but they do not define in what state the premises ought to be in order to make it necessary to put them into decent repair. But upon principle the incumbent ought to leave to his successor the premises in the same state of repair in which he is bound by law to keep them; viz., in a state fit for the occupation of a person holding such a benefice. In *Percival v. Cooke*, 2 Carr. & Payne, 460, BEST, C. J., at *Visi Prius*, stated it to be his opinion that the executors of a deceased incumbent are bound to do nothing more than to restore what is actually in decay, and to make such repairs as are absolutely necessary for the preservation of the premises, and upon his intimating that opinion the case was compromised. There was no opportunity or occasion for questioning the correctness of the rule so laid down. It is no more than a *dictum* at *Visi Prius*, and entitled to very little weight. The incumbent is bound to rebuild as well as

repair. The Bishop of Litchfield and Coventry was suspended for dilapidations, and the profits of the bishoprick were sequestered, and the episcopal palace built out of them. *Doctor Wood's* case, cited 12 Mod. 237. The ordinary may enforce such reparation as the ecclesiastical law requires during the life of the incumbent by sequestration of the profit, or by ecclesiastical censures even to deprivation. By the 57 G. III. c. 99, non-residents are required to keep their houses in good and sufficient repair; and s. 63 provides, that where a curate is appointed by the incumbent, and receives the whole profit of the * benefice, [* 304] he shall allow any sum not exceeding one fourth of such profit as shall have been expended in repair of the chancel, parsonage house, or residence.

Thesiger, *contra*. The principle last stated in the case is the one upon which the estimate ought to have been made, viz., that the incumbent is bound to leave the rectory-house, buildings, and chancel in that state of reparation only in which an outgoing lay tenant, not obliged by covenant to do repairs, ought to leave them. Damages are recoverable at law for dilapidations, upon the same principle on which they are recoverable in case of permissive waste. This appears not only from the import of the term itself, but from the light in which dilapidation was formerly viewed. With regard to the term, Cowell in his Dictionary says, "It is a wasteful spending or destroying, or the letting buildings run to ruin and decay for want of due reparation." Degge in his Parson's Counsellor, p. 134, says, "A dilapidation is the pulling down or destroying in any manner, any of the houses or buildings belonging to a spiritual living, or the chancel, or suffering them to run into ruin or decay, or wasting and destroying the woods of the church, or committing or suffering any wilful waste in or upon the inheritance of the church;" and to the same effect is Godolphin's Repertorium, p. 173, Black. Com., book 3, c. 7, p. 91. As to the light in which it was formerly regarded, it appears that dilapidation of the house of the bishopric was formerly good cause of deprivation, 3 Inst. 204; *Stockman v. Wither*, Roll. Rep. 86, and in that case, waste and dilapidation are treated as synonymous. In the *Bishop of Salisbury's* case, Godb. Rep. 259, it was holden, that if a bishop, parson, or ecclesiastical person, do cut down trees upon the lands, * unless it be for repara- [* 305] tions of the ecclesiastical house, or do or suffer to be done

any dilapidations, they may be punished for the same in the ecclesiastical court, and a prohibition will not lie, and the same is good cause of deprivation of their ecclesiastical livings and dignities. But yet for such waste done, they may be punished also at common law, if the party will sue there (meaning by the party the succeeding incumbent). So in 11 Co. Rep. 49 *a*, Lord CÔKE, referring to the Year Books, says, if a bishop or archdeacon abates or fells all the wood he has, as bishop, he shall be deposed, as dilapidator of his house. A milder course, however, was to proceed by prohibition, to restrain ecclesiastical persons from committing dilapidations or waste, *Knowle v. Harvey*, Roll. Rep. 335, 3 Bulstr. 158, and the *Bishop of Durham's* case cited in *Liford's* case, 11 Co. Rep. 49 *a*; but in *Jefferson v. The Bishop of Durham*, 1 Bos. & P. 105, it was held by the Court of Common Pleas that they had no power to issue a prohibition. The third course seems to have been founded on the constitution, already referred to, of Cardinal Othobon, 1268, 52 H. III. (Gibson's Codex, 751), requiring the bishops and archdeacons to admonish their clerks decently to repair the houses of their benefices and other buildings; and if they neglected for the space of two months, the bishop was to cause the same to be effectually done at the cost and charges of such clerk, out of the profits of his church and benefice, causing so much thereof to be received as should be sufficient for such reparation. The amount to be sequestered was originally left to the discretion of the ordinary. But by injunctions in the reigns of Hen. VIII., Edw. VI., and Eliz., (mentioned in the notes [* 306] to Gibson's Codex, p. 753), * the amount was restrained to one fifth, and by the *Reformatio Legum Ecclesiasticarum* to one seventh. This mode of repairing dilapidations during the incumbency prevails at the present day, and the ecclesiastical Court rarely allows more than one fifth. *North v. Barker*, 1 Phill. 309. These modes of proceeding, deprivation, prohibition, and sequestration, all indicate a spoliation or destruction of the property, as the groundwork of the proceeding.

Thus stood the law with regard to repairs during the incumbency, and so it partly remains at this day. But as it might frequently happen that an incumbent might resign or die before the repairs were completed, it was necessary to make a provision for such contingency. Accordingly, there is to be found in Lyndewood's *Provinciale*, lib. iii. tit. 27, p. 250, ed. Oxon., a very early

canon of Edmund, Archbishop of Canterbury, in the reign of Henry V., on the subject

A remedy seems always to have existed at common law [307] against the executors of a deceased rector; though Gibson, in his *Codex*, 753, says, that the first writer who advanced the notion of such an action in the temporal courts was Sir Simon Degge, and the first case in which the remedy was established was *Jones v. Hill*, 3 Lev. 268. After stating that prebends, rectors, and vicars are bound to repair and support their houses and buildings, Degge, in the *Parson's Counsellor*, Part I., c. 8, p. 138, states the custom, which is the foundation of this action, in the following words, which are nearly the same as in 1 Lutwidge, 116: "Et si hujusmodi prebendarii, rectores, et vicarii domus et edificia hujusmodi, successoribus suis sic, ut præmittatur, reparata et sustentata, non demiserunt et deliquerunt; sed ea irreparata *et* (not *vel*) dilapidata permiserunt, executores sive administratores bonorum et catallorum talium præbendariorum, rectorum et vicariorum, post eorum mortem de bonis et catallis decedentium successoribus talium præbendariorum, rectorum et vicariorum, tantam pecunie summam quantum pro necessaria reparatione et edificatione hujusmodi domorum et edificiorum expendi aut solvi sufficet, satisfacere teneantur." By these expressions it is obvious that the measure of damages against the executor is that sum of money which would be required to repair and sustain that which is ruinous and dilapidated, and which was necessary to be repaired, &c.

* Now the omission to repair what is absolutely neces- [* 308] sary is in fact the case of permissive waste. The foundation of this action is a tort, and it is an exception to the general rule, "*actio personalis moritur cum personâ*." In *Sollers v. Lawrence*, Willes, 421, WILLES, C. J., gives a reason for the action lying, that it is not considered as a tort in the testator, but as a duty which he ought to have performed; and, therefore, his representatives, so far as he left assets, shall be equally liable as himself. But the editors of the last edition of Saunders, vol. i. p. 216, observe, "that the action is in form an action on the case in tort, and that it could not possibly be framed in assumpsit, as on a contract, for the plaintiff must be the succeeding rector, who cannot be known until after the death of his predecessor, and of course could not contract with him." The ground of the action being an omission to perform a duty cast by law on the rector, it

becomes necessary to consider the relation in which he stands to the benefice. The parson is considered as having the fee, when it is for the benefit of the church that he should be so considered; but when that would be detrimental to the church, he is considered as being tenant for life. He is like a tenant for life, with impeachment of waste, or tenant for years or from year to year, who is not bound by covenants. Each of these is entitled to the usufruct of the property, and bound by his relation to that property to keep it in a tenantable condition. What would be a breach of their obligation would be a breach of that of the rector. By the statute of Marlbridge, a tenant for life or for years is liable

for waste. But it is clear that an outgoing lay tenant is [* 309] not bound to do more than *necessary repairs. In 2 Ro.

Abr. 816, tit. Waste, pl. 36, it is laid down, "If a tenant permit a chamber to be in decay, for default of plastering, whereby the great timber becomes rotten, and the chamber becomes very foul and filthy, an action of waste lies." So if the lessee permit the walls to be in decay for want of daubing, whereby the timber becomes rotten, pl. 37. *Ferguson v. Nightingale*, 2 Esp. 390 (5 R. R. 757), *Russell v. Smithies* (No. 13, p. 508, *post*), 1 Anstr. 96 (3 R. R. 560), and *Horsfall v. Mather* (No. 5, p. 463, *post*), Holt's N. P. 7 (17 R. R. 589), also show that the obligation of a tenant (not bound by covenant) only extends to necessary repairs. As to ecclesiastical persons, there is no express decision. In *North v. Barker*, 3 Phillimore, 307, Sir JOHN NICHOLLS intimates, that the executors of a deceased incumbent are not bound to renovate a building, even in its ancient form, much less in its pristine beauty, and that the thorough repair of the old building is not all to fall on one incumbent. The rule laid down by BEST, C. J., in *Percival v. Cooke*, 2 C. & P. 200, is reasonable, considered with reference to the liability of a lay-tenant for life or years. The statute, 13 Eliz. c. 10, contains a legislative declaration as to the dilapidations which executors of a deceased incumbent ought to pay for. . . .

[310] By the 17 Geo. III., c. 53, the incumbent, where there is no house, or such house is become so ruinous and decayed that one year's produce of the living will not be sufficient to put the house in repair, may, after having an estimate prepared, with the consent of the ordinary, borrow money to rebuild, and mortgage the glebe tithes, &c.; and by sections 6 and 7 the living is

charged, and by section 9 all sums recovered by suit or secured by composition of any former incumbent of the living are to be applied in part of *the payments under the esti- [* 311] mate. According to the argument on the other side, this Act of Parliament can apply to cases only where the incumbent dies insolvent; for if the representatives of a deceased incumbent are to supply whatever is deficient, and restore what is decayed, the house never can become ruinous or decayed, because if it be destroyed by lightning or prostrated by tempest, it must be rebuilt by the rector by virtue of his common-law obligation. There are no decisions expressly in point as to the extent of the liability of a rector. He is entitled to the fair usufruct of the gradually consuming property: he ought, therefore, to be allowed to treat the premises in such a way as a prudent person having a perpetual interest would do. If the interior of the house is in such a state that the incumbent might fairly take another year's wear out of it, the accident of his death before the expiration of that year, ought not to throw on his representatives the burden of doing it before the time. A succeeding rector who will have a portion of the profits of the benefit, must bear his part in the support of the decaying inheritance.

Brodrick in reply. . . .

Cur. adv. vult.

BAYLEY, J., now delivered the judgment of the Court. [312] This was an action for dilapidations by the successor against the executor of the deceased rector; and the question was, by what rule the dilapidations as to the rectory house, buildings, and chancel were to be estimated? Three rules were proposed for our consideration. First, that the predecessor ought to have left the premises in good and substantial repair, the painting, papering, and whitewashing being in proper and decent condition for the immediate occupation and use of his successor, and that such repairs were to be ascertained with reference to the state and character of the buildings, which were to be restored where necessary, according to their original form, without addition or modern improvement, and the estimate according to his rule came to £39 18s. 6d.

The second rule proposed was, that they were to be left as an outgoing lay-tenant ought to leave his buildings where he is under covenant to leave them in good and sufficient repair, order,

and condition, and the estimate by that rule was £310, the papering, painting, and whitewashing not being included.

The third rule was, that they were to be left wind and water tight only, or, as the case expresses it, in such condition as an outgoing lay-tenant, not obliged by covenant to do any repairs, ought to leave them, and by that rule the estimate would be £75 11s.

We are not prepared to say that any of these rules are precisely correct, though the second approaches the most nearly to that which we consider as the proper rule.

The law and custom of England, or, in other words, the common law, as stated in some of the earliest precedents, [* 313] *p. 12 & 13 Hen. VIII. Rot. 126, C. B., and others which we have searched, and in 1 Lutw. 116, is as follows:—
 “Omnes et singuli prebendarii, rectores, vicarii, &c., pro tempore existentes, omnes et singulas domos, et edificia, prebendariorum, rectoriarum, vicariarum, &c., reparare et sustentare, ac ea successoribus suis, reparata, et sustentata, dimittere, et relinquere teneantur; et si hujusmodi prebendarii, rectores, vicarii, &c., hujusmodi domus, et edificia, successoribus suis, ut premittatur, reparata et sustentata, non dimiserint, et reliquerint, sed ea irreparata et dilapidata permiserint, eidem prebendarii, &c., in vitis suis, vel eorum executores, sive administratores, &c., post eorum mortem, successoribus prebendariorum, &c., tantam pecunie summam, quantam pro reparatione, aut necessariâ reedificatione hujusmodi domorum, et edificiorum expendi aut solvi sufficiet satisfacere teneantur.” An averment in terms nearly similar has been usually introduced into all declarations on this subject.

From this statement of the common law, two propositions may be deduced: first that the incumbent is bound, not only to repair the buildings belonging to his benefice, but also to restore and rebuild them if necessary. Secondly, that he is bound only to repair, and to sustain, and rebuild when necessary. Both these rules are very reasonable, the first, because the revenues of the benefice are given as a provision, not for a clergyman only, but also for a suitable residence for that clergyman, and for the maintenance of the church: and if by natural decay, which, notwithstanding continual repair, must at last happen, the buildings perish, these revenues form the only fund out of which the means of replacing them can arise. The second rule is equally consistent with

reason, in requiring that which is useful only, not that [314] which is matter of ornament or luxury.

It follows, from the first of these propositions, that the third mode of computation proposed in the case cannot be the right one, because a tenant, not obliged by covenant to do repairs, is not bound to rebuild or replace. The landlord is the person who, when the subject of occupation perishes, is to provide a new one if he think fit. And if the second proposition be right, a part of the charges contained in the first mode of computation must be disallowed; for, papering, whitewashing, and such part of the painting as is not required to preserve wood from decay, by exposure to the external air, are rather matters of ornament and luxury, than utility and necessity.

The authorities which have been cited from the canon law are in unison with that which we consider to be the rule of the common law.

The earliest provision on this subject is the provincial constitution of Edmund, Archbishop of Canterbury, passed, A.D. 1236, 21 H. III. It is in the following terms: "*Si rector alienius ecclesiæ decedens domos ecclesiæ reliquerit dirutas, vel ruinosas; de bonis ejus ecclesiasticis tanta portio deducatur, quæ sufficiat ad reparandum hæc, et ad alios defectus ecclesiæ supplendos.*" That constitution, therefore, directs the repairing "*domos ecclesiæ dirutas vel ruinosas.*" And Lyndewood's commentary upon the word "*ad reparandum*" is, "*Scilicet diruta vel ruinosæ. Et intellige hanc reparationem fieri debere secundum indigentiam et qualitatem rei reparandæ; ut scilicet, impensæ sint necessariae non voluptuose.*" The next authority cited from the canon law was the following legatine * constitution of Othobon, promulgated A.D. 1268, 52 H. III. "*Improbam quorundam avaritiam prosequentes, qui cum de suis ecclesiis et ecclesiasticis beneficiis multa bona suscipiant, domos ipsarum, et cætera ædificia negligunt, ita ut integra ea non conservent, et diruta non restaurent;*" that is the imputation against the clergy. The constitution then goes on: — "*Statuimus et precipimus ut universi clerici suorum beneficorum domos, et cætera ædificia prout indigerint reficere studeant condecenter, ad quod per episcopos suos vel archidiaconos solícite moneantur. Cancellis etiam ecclesiæ per eos qui ad hoc tenentur refici faciant, ut superius est expressum. Archiepiscopos vero et episcopos, et alios inferiores prælatos,*

domos et ædificia sua sarta tecta, et in statu suo conservare et tenere, sub divini judicii attestazione præcipimus, ut ipsi ea refici faciant, quæ refectione noverint indigere."

The statute 13 Eliz. c. 10 speaks of ecclesiastical persons suffering their buildings, for want of due reparation, partly to run to ruin and decay, and in some part utterly to fall to the ground, which, by law, they are bound to keep and maintain in repair; and makes the fraudulent donee of the goods of an incumbent liable for such dilapidation as hath happened by his fact and default. If the incumbent was bound by law to keep and maintain the dwelling-house in repair, any breach of his duty in that respect would be a default. The 57 Geo. III. c. 99, s. 14, enacts that a non-resident spiritual person shall keep the house of residence in good and sufficient repair; and directs, that if it be out of repair, and remain so, the parson is to be liable to the penal-

ties of non-residence, until it is put into good and sufficient repair to the satisfaction of the bishop. * There is nothing, either in the authorities cited from the canon law, or in these Acts of Parliament, to show that the obligation of an incumbent to repair is other than that which I have already stated the common law threw upon him; viz., to sustain, repair, and rebuild when necessary.

Upon the whole, we are of opinion the incumbent was bound to maintain the parsonage (which we must assume upon this case to have been suitable in point of size, and in other respects, to the benefice), and also the chancel, and to keep them in good and substantial repair, restoring and rebuilding, when necessary, according to the original form, without addition or modern improvement; and that he was not bound to supply or maintain anything in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay) and whitewashing and papering belong; and the damages in this case should be estimated upon that footing. It will be found that this rule will correspond nearly with the second mode of computation and probably will be the same if the terms "order and condition" are meant, as they most likely are, not to include matters of ornament or luxury.

It was afterwards referred to the Master to calculate the damages upon this principle, and to report for what the judgment should be entered up, and he directed it to be for £369 18s. 6d., and for that sum there was

Judgment for the plaintiff.

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ENGLISH NOTES.

The following persons have been held liable to their successors for dilapidations. A prebendary, *Radeliff v. D'Oyley* (1788), 2 T. R. 630, 1 R. R. 560; a perpetual curate, *Mason v. Lambert* (1848), 12 Q. B. 795, 17 L. J. Q. B. 366; a vicar choral, *Gleares v. Parfitt* (1860), 7 C. B. (N. S.) 838, 29 L. J. C. P. 216, 6 Jur. N. S. 805; a rector, *Wise v. Metcalfe*, the principal case. In *Pawly v. Wiseman*, 3 Keb. 562, 614, a curate who was removable at will was held not liable for dilapidations, on the ground that he had no freehold. This view is supported by *Wright v. Smythies* (1808), 10 East, 409, 10 R. R. 337, and *Browne v. Ramsden* (1818), 2 Moore, 612, 8 Taunt. 559.

The personal representatives of the predecessor are liable for the dilapidations. *Wise v. Metcalfe*, *supra*. The personal representatives of the successor may maintain an action against the personal representatives of the predecessor. *Bunbury v. Hewson* (1849), 3 Ex. 558, 18 L. J. Ex. 258.

A similar rule is applicable upon an exchange of livings. There each is considered as the successor of the other, and may maintain an action against the other for dilapidations. *Downes v. Craig* (1841), 9 M. & W. 166. The opinions expressed in that case that an agreement, upon an exchange of livings, that neither should have a right of action in respect of dilapidations, would necessarily be simoniacal and void, cannot be regarded as law. If there was an honest belief that the amount recoverable by each as against the other would be practically equal, there is no objection to an agreement that the possessions shall be taken in their present condition. *Goldham v. Edwards* (Ex. Ch. 1856), 18 C. B. 389, 25 L. J. C. P. 223, 2 Jur. N. S. 493. And since the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Viet. c. 43), the law remains the same. *Wright v. Davies* (C. A. 1876), 1 C. P. D. 638, 46 L. J. C. P. 41, 35 L. T. 188, 24 W. R. 841.

“By common law the parishioners of every parish are bound to repair the church, but by the canon law the parson is bound to do it, and so it is in foreign countries. In London the parishioners repair both church and chancel, though the freehold is in the parson, and it is part of his glebe, for which he may bring an ejectment.” *Per Holt*. Cu. J., *Ball v. Cross* (1688), 1 Salk. 164; *Pense v. Prowse* (1696), 1 Ld. Raym. 59. But a section of the inhabitants of a parish might show that they were exempt by prescription. *Craven v. Sanderson* (1836), 4 Ad. & Ell. 666, 2 Nev. & P. 641. The inhabitants were liable by reason of occupancy, and actual residence was not necessary. *Stephenson v. Case* (1601), Cro. Eliz. 843; *Anon.* (1611), 1 Bulstr. 20. The obligation extended to the ornaments in the church. *Anon.*, *supra*,

contra, 2 Inst. 489. Ornaments however cannot be erected without the consent of the incumbent or the ordinary. *Beckwith v. Harding* (1818), 1 B. & Ald. 508, 19 R. R. 372. The church rate which used to be raised to discharge this obligation can no longer be enforced by legal proceedings. 31 & 32 Vict. c. 109. This act does not however change the incidence of the liability to repair the church, and the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), expressly recognizes that the parson may be exempt from liability to repair part, at any rate, of the benefice.

There are conflicting opinions in the Court of Common Pleas whether a lay impropiator was liable to the same extent as a rector would have been. *Anon.*, 3 Keb. 829; *Wallwain v. Auberry* (1678), 2 Vent. 35.

The obligation to repair is not co-extensive with the beneficial profits of the benefice. Thus where an incumbent is entitled to the surplus profits of lands vested in trustees, he is not liable for the dilapidations on the trust property. *Wright v. Smythies* (1808), 10 East, 409, 10 R. R. 337; *Browne v. Ramsden* (1818), 2 Moo. 612, 8 Taunt. 559.

The liability extends to the residence. *Radeliffe v. D'Oyley* (1788), 2 T. R. 630, 1 R. R. 560. Where the parsonage house is destroyed by fire the parson is liable to repair that damage. See *Sollers v. Lawrence* (1743), Willes, 413. After the great fire of 1666 parsons, vicars, and incumbents were relieved from this obligation by statute: 22 Car. II. c. 11. This liability is now modified by 34 & 35 Vict. c. 43, s. 47. The incumbent is charged with the maintenance and repairs of all hedges, fences, ditches, and other things of a like character. 2 Burn's Ecc. Law, 150; approved *Bird v. Relph* (1835), 2 Ad. & Ell. 777. Felling wood for timber otherwise than for repairs or fuel is an act of waste for which the incumbent is responsible, as for a dilapidation. *Knoble v. Harvey* (1638), 3 Bulst. 158; *Herring v. Dean, &c. of St. Paul* (1819), 3 Swanst. 492, 2 Wils. Ch. 1, 19 R. R. 259. Where however the timber on the benefice was inconveniently situated, the dean and chapter were permitted to sell the timber and apply the proceeds in the purchase of other timber on the spot, as the purchased timber was employed in a legitimate manner. *Wither v. Dean, &c. of Winchester* (1817), 3 Meriv. 421, 17 R. R. 107. A sale of timber generally to provide a building fund is not authorized. *Saunders v. Fryer* (1869), L. R. 8 Eq. 417. Mines may now be leased with the consent of the Ecclesiastical Commissioners by 5 & 6 Vict. c. 108. *Ecclesiastical Commissioners v. Woodhouse* (1895), 1895, 1 Ch. 552, 64 L. J. Ch. 329, 72 L. T. 257, 43 W. R. 395. The action will not lie for anything in the nature of meliorating waste. *Huntley v. Russell* (1849), 13 Q. B. 572, 18 L. J. Q. B. 239, 13 Jur. 837. An action will not lie for the removal of buildings resting on foundations, if the building is not

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itself part of the freehold. *Huntley v. Russell, supra*; *Martin v. Roe* (1857), 7 Ell. & Bl. 237, 26 L. J. Q. B. 129, 3 Jur. N. S. 465.

An action will not lie against the executors for miscultivation of the glebe. *Bird v. Relph* (1833), 4 B. & Ad. 826, 1 Nev. & M. 415. In *Ross v. Adcock* (1868), L. R., 3 C. P. 655, 37 L. J. C. P. 290, 19 L. T. 202, 16 W. R. 1193, the Court held that an action would not lie against the representatives of an incumbent for waste committed by digging gravel. This determination is apparently in conflict with that of the Court of Queen's Bench in *Huntley v. Russell, supra*, which was however distinguished in *Ross v. Adcock*. It would seem at first sight that as the estate of the incumbent is presumably enriched by the sale of the gravel, the case should form an exception to the rule *actio personalis moritur cum personâ*. It is however to be observed that the action at law has always been rested on a special custom, and that, so far as is now known, no action has ever been allowed against the representatives in respect of anything that was not a building or structure. It is upon the footing that the claim rests entirely on custom, that the claim against the estate of a deceased incumbent was postponed in the administration of his estate to specialty and simple contract debts. *Bryan v. Clay* (1852), 1 Ell. & Bl. 38, 22 L. J. Q. B. 23. The law has since been altered in this respect, as noted below.

The acts of an incumbent may be called in question upon a visitation. At one time Courts of common law used to grant a prohibition, but this remedy is now obsolete: see the observation in *Jefferson v. Bishop of Durham* (1797), 1 Bos. & P. 105, which is apparently the last case in which this form of action was tried. The Ecclesiastical Courts, as is mentioned in the principal case, have also been resorted to. The most effective remedies seem to be by injunction, if the incumbent is in occupation of the living, or by an action upon the case. The patron is the proper person to apply for an injunction to restrain waste by an incumbent. *Holden v. Weekes* (1860), 30 L. J. Ch. 35, 9 W. R. 94. The majority of the later common law cases before cited have been actions on the case.

Where damages for dilapidations were payable out of the estate of a deceased incumbent, they ranked in administration after specialty and simple contract debts, so far as they were payable out of legal assets. *Bryan v. Clay* (1852), 1 Ell. & Bl. 38, 22 L. J. Q. B. 23, 17 Jur. 276. In the case of equitable assets, they ranked *pari passu* with specialty and simple contract debts. *Bisset v. Burgess* (1856), 23 Beav. 278, 26 L. J. Ch. 697, 2 Jur. N. S. 1221. They are now payable *pari passu* with specialty and simple contract debts, whether the assets are legal or equitable. *In re Monk, Wayman v. Monk* (1887), 35 Ch. D. 583, 56 L. J. Ch. 809, 56 L. T. 856, 35 W. R. 691.

The object of the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), is not to vary the liability of persons, but merely to provide a convenient method for the ascertainment and recovery of dilapidations. (*Per curiam Wright v. Davies* (C. A. 1876), 1 C. P. D. 638, 46 L. J. C. P. 41, 35 L. T. 188, 24 W. R. 841.) Under this statute surveyors are appointed for each diocese (s. 8). The surveyors make reports after inspection upon the complaint of the archdeacon, rural dean, or patron, or upon the request of the incumbent (ss. 12 & 14). The report must contain a detailed specification of the works required, the estimated cost, and the time within which the works should be executed (s. 15). The Act also makes provision for benefices under sequestration (ss. 13 & 14). The incumbent or sequestrator is entitled to object to the report on any grounds of fact or law, and the objection is to be determined by the bishop (s. 16). There is also a provision made for the residences of the higher church dignitaries (ss. 25 to 28). Where no objections are taken to the report of the surveyor, and the living is sequestered, the sequestrator is not justified in expending a larger sum than is estimated by the report as necessary. *Kimber v. Parracism* (1885), 15 Q. B. D. 222, 54 L. J. Q. B. 471, 53 L. T. 299, 33 W. R. 907.

The avoidance of the living occurring after the report does not affect the report, order, or proceedings thereunder, but the report is to be acted upon as if the report had been made after a vacancy (s. 24).

The provisions respecting the carrying out of the order made on the report are contained in sections 19, 20, 21, and 23. Where a complaint is made to the bishop by the archdeacon, rural dean, or patron, if the incumbent, within 21 days after notice of such complaint, informs the bishop in writing that he intends to put the buildings in proper repair, the bishop may give him a reasonable time to do so, and if satisfied that the necessary repairs have been executed must abstain from further proceedings. The bishop is however entitled, during the progress or after the completion of the repairs, to direct the surveyor to inspect and report on the repairs, and if the repairs are reported to be insufficient may proceed as if the incumbent had not given notice of his intention to do the repairs (s. 22).

When the repairs are finished to the satisfaction of the surveyor, he gives a certificate which is conclusive evidence of the due execution of the prescribed works (s. 46). No further order can be made, except at the request of the incumbent himself, for the execution of further works for a period of five years from the filing of the certificate, and if the incumbent dies within that period his personal representatives are exempted from liability, but this exemption does not extend to an act of wilful waste (s. 47). There is another exception of damage by fire where the buildings are not insured against fire (s. 47).

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Within three months after an avoidance, the bishop may direct an inspection by the surveyor for the purpose of making a report on dilapidations, unless the late incumbent is free from liability by reason of section 47 (s. 29). The three months refer to the direction of the bishop and not to the report of the surveyor. *Gleaves v. Marriner* (1876), 1 Ex. D. 107, 34 L. T. 496, 25 W. R. 539. The section has been held to be directory, and a direction may be given by the bishop after the expiration of the three months. *Caldow v. Pixell* (1877), 2 C. P. D. 562, 46 L. J. C. P. 541, 36 L. T. 469, 25 W. R. 773. The procedure is practically the same as under the earlier sections: (see sections 30, 31, 32, 33, 34, and 35). The sum stated in the order made by the bishop is "a debt due from the late incumbent, his executors or administrators, to the new incumbent, and shall be recoverable as such at law or in equity" (s. 36). The sum so stated may be proved *pari passu* with the debts of the other creditors of a deceased incumbent. *In re Monk, Wayman v. Monk* (1887), 35 Ch. D. 583, 56 L. J. Ch. 809, 56 L. T. 856, 35 W. R. 691.

The statute enacts (s. 53), "No sum shall be recoverable for dilapidations in respect of any benefice becoming vacant after the commencement of this Act, and to which this Act shall be applicable, unless the claim for such sum be founded on an order made under the provisions of this Act." Where the benefice is under sequestration at the death of the incumbent, the sequestrator cannot be made liable for dilapidations ordered to be repaired under section 34. *Jones v. Dangerfield* (1876), 1 Ch. D. 438, 45 L. J. Ch. 161, 34 L. T. 387, 24 W. R. 203. In that case, as the deceased incumbent had left no estate, the new incumbent was left without a remedy, although there were surplus profits from the benefice accrued in the lifetime of the late incumbent.

The Act applies "to all such houses of residence, chancels, walls, fences, and all other buildings and things as the incumbent of the benefice is by law or custom bound to maintain in repair" (s. 4).

AMERICAN NOTES.

This principle has no place in American jurisprudence.

No. 2. — **Belfour v. Weston**, 1 T. R. 310, 311. — Rule.

No. 2. — **BELFOUR v. WESTON.**

(K. B. 1786.)

No. 3. — **HART v. WINDSOR.**

(EX. 1843.)

RULE.

As between landlord and tenant, there is not an implied obligation on the part of the landlord, to repair the structure, or an implied warranty that the premises are fit for the purpose for which they are let, except in the case of furnished houses or apartments.

Belfour v. Weston.

1 Term Reports 310-312 (1 R. R. 210).

Landlord and Tenant. — Accidental Fire. — Liability to Repair.

[310] A lessee who covenants to pay rent, and to repair, with express exception of casualties by fire, is liable upon the covenant for rent though the premises are burned down, and not rebuilt by the lessor after notice.

This was an action of covenant.

The declaration stated, That by an indenture made on the 1st of July, in the 17th year of the reign, &c., the intestate demised to the defendant a messuage or tenement, with the warehouses, &c., in Wapping-street, for 21 years, at the yearly rent of £22 payable quarterly; in which indenture was a covenant on the part of the defendant for the payment of rent. That the defendant entered, &c. It then stated a breach of the covenant for non-payment of half a year's rent, due at Lady day, 1784.

Plea — That by the said indenture of lease, in the said declaration mentioned, it is farther covenanted that he, the said [† 311] * defendant, should and would, at his own proper costs and charges, from time to time, and at all times, during the continuance of that demise, well and sufficiently repair, uphold, support, &c., and keep the said messuage or tenement and premises, thereby demised, and every part and parcel thereof, with their and every of their appurtenances, and all the glass windows, pave-

No. 2. — *Belfour v. Weston*, 1 T. R. 311, 312.

ments, &c., thereunto belonging, in, by, and with, all and all manner of needful and necessary reparations and amendments whatsoever, when, where, and as often as, need or occasion shall be or require (casualties by fire only and always excepted); and the said messuage or tenement, and all and singular other the premises, being so well and sufficiently repaired, upheld, &c., and kept as aforesaid, should and would, at the end or other sooner determination of that present demise, which should first happen, peaceably and quietly leave, surrender, and yield up unto the said intestate, his heirs, or assigns (casualties by fire only excepted as aforesaid). And, moreover, that it should and might be lawful to and for the said intestate, his heirs and assigns, and every of them, and their and each of their attornies or agents, stewards or officers, with workmen or others, in their respective company or companies, or without, twice or oftener in every year, yearly, during the term thereby granted, at reasonable times in the day-time, to enter and come into and upon the said messuage or tenement and premises thereby demised, every or any part thereof, there to view, search, and see the state and condition of the same, and of the repairs thereof, and of all defects, decays, and wants of reparation, then and there found, to give or leave notice or warning, in writing at or upon the said premises or some part thereof, unto or for the said defendant, his executors, administrators, or assigns, to repair and amend the same within the space of three calendar months then next following; within which said time or space of three months, the said defendant, for himself, his executors, administrators, and assigns, and every of them, did thereby covenant, promise, and agree to and with the said intestate, his heirs, and assigns, to repair and amend the same accordingly (casualties by fire only excepted as aforesaid). And the said defendant further saith, that the said plaintiff ought not to have or maintain his aforesaid action against him, because he saith that before Michaelmas day, 1783, to wit, on the 28th of September, 1783, the said demised premises, with the appurtenances, against the will and without the default of the said defendant, were burned, and consumed by fire, whereof the * said intestate [* 312] afterwards in his lifetime, to wit, on the same day and year last aforesaid, at, &c., had notice; and the said intestate was then and there requested by the said defendant to rebuild the premises aforesaid with the appurtenances. And the said defend-

No. 3. — Hart v. Windsor, 12 Mees. & Wels. 68.

ant further saith, that the said demised premises, with the appurtenances, were not, nor was any part thereof, rebuilt by the said intestate, for half a year next following the said Michaelmas day in the said year 1783, nor are the same yet rebuilt. And the said defendant during all the time aforesaid neither had or enjoyed, nor could have or enjoy, any use, benefit, or occupation of the said demised premises, with the appurtenances. And this the said defendant is ready to verify, wherefore, &c.

To this plea there was a general demurrer, and joinder in demurrer.

The Court did not hear any argument on this case; they being of opinion that the point had already been determined by the authorities in All. 27, 2 Stra. 763, and 2 L. Raym. 1477: and,

BULLER, J., read the following note of the case of *Pindar v. Ainsley and Rutter*, at the Sittings at Westminster, after Michaelmas Term, 1767. That was an ejectment by the tenant against his landlord to recover the possession of some houses which had been burned down during the term, and had been rebuilt by the landlord. In the lease there was an express covenant on the part of the tenant to pay rent; but he had paid none subsequent to the time of the fire. Lord MANSFIELD, before whom this was tried, said, the consequence of the house being burned down is, that the landlord is not obliged to rebuild, but the tenant is obliged to pay the rent during the whole term. The premises consist of houses only, and the fire has made them quite useless. In March, 1763, the premises were worth nothing: but the landlord, if he had insisted on the rigour of the law, might have obliged the plaintiff to pay the rent for nothing during the remainder of the term; and then the plaintiff would have been glad to have delivered up the premises. The houses being insured is nothing to the tenant. Therefore he left it to the jury to consider, whether it was not to be presumed that the tenant had abandoned the lease at the time of the fire; and, accordingly, the defendant had a verdict.

Judgment for the plaintiff.

Hart v. Windsor.

12 Meeson & Welsby 68-88 (s. c. 13 L. J. Ex. 129; 8 Jur. 150).

Landlord and Tenant. — Unfurnished House. — No implied Warranty. — Bugs.

[68] Debt. — The declaration stated that the plaintiff agreed to let to the defendant a house and garden ground, with the use of the fixtures therein,

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for the term of three years, at a rent payable quarterly, the tenant to preserve the messuage and premises in good and tenantable repair; by virtue of which the defendant entered, and continued in possession until a quarter's rent accrued under and by virtue of the agreement. Plea, that the house was demised to the defendant for the purpose of his inhabiting the same, but that before and at the time of the agreement, and also when the defendant entered, and from thence until and at the time of his quitting and abandoning the possession of the same, it was not in a fit state or condition for habitation, but in that state that the defendant could not reasonably inhabit or dwell therein or have any beneficial occupation of the same, by reason of the same being greatly infested with bugs, and not by reason of any act or default of the defendant; and that before the rent or any part of it became due, he quitted the possession, and gave notice thereof to the plaintiff, and ceased all further occupation of the same, and derived no benefit therefrom; and that from the commencement of the term until his so quitting, he had no beneficial use or occupation of the same. The jury having found for the defendant on the issue raised by this plea: *Held*, on motion for judgment *non obstante veredicto*, that the plea was no answer to the action, inasmuch as the law implied no contract on the part of the lessor, that the house was at the time of the demise, or should be at the commencement of the term, in a reasonably fit state and condition for habitation.

Secondly, that the demise being of a house and garden ground, in order to make the plea good, it must be held that if a house be taken for habitation, and land for occupation, by the same lease, there is such an implied contract for the fitness of the house for habitation as that its breach would authorize the tenant to give up both. But *held*,

Thirdly, that there is no implied warranty on a lease of a house, or of land; that it is or shall be reasonably fit for habitation, occupation, or cultivation; and that there is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let.

Quere whether, if there were such a contract or condition implied by law, generally, it would be implied in a case where the tenant agrees to preserve the premises in tenantable condition.

Debt. — The declaration alleged, that whereas theretofore, to wit, on the 23d June, 1843, by a certain memorandum of agreement made and entered into between the plaintiff of the one part, and the defendant of the other part, the plaintiff agreed to let, and the defendant agreed to hire and take of the plaintiff, a certain messuage or tenement and garden ground, in the said memorandum of agreement particularly mentioned and described, with the use of several fixtures and things therein, for the term of three years from the 24th of June then instant, at the yearly rent of £50, payable quarterly, on the 29th of September, the 25th of December, the 25th of March, and the 24th of June, in each year of the said term, free from all deductions whatsoever; the first payment

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[* 69] thereof to be made on *the 29th of September then next ensuing, the plaintiff paying all rates and taxes in respect of the said premises, and the defendant paying all personal rates and taxes; and the defendant, amongst other things, agreed to preserve the said messuage or tenement and premises in good and tenantable repair and condition, and to deliver up the said messuage or tenement and premises in like repair and condition, together with all the keys, fixtures, and other things thereupon or belonging thereto (reasonable wear and tear and damage by fire only excepted), at the end or other sooner determination of the said term of three years, as by the agreement fully appears; by virtue of which said agreement the defendant then entered into and became possessed of the said messuage or tenement and premises, and was and continued possessed thereof from the said 24th of June, 1843, until and upon the 29th of September in the same year, when a large sum of money, to wit, £12 10s. of the rent aforesaid, for one quarter of a year of the said term, ending on the day and year last aforesaid, and then last elapsed, became and was due and payable from the defendant to the plaintiff, under and by virtue of the said agreement, and still is in arrear and unpaid to the plaintiff, whereby, &c.

Pleas: first, a traverse of the agreement stated in the declaration; secondly, that the said messuage or tenement was so demised and let to the defendant for the purpose of his inhabiting the same, and dwelling therein during the said term; and that before and at the time of making the said agreement, and also at the time when the defendant entered into and became possessed of the messuage or tenement and premises, as in the declaration alleged, and from thence until and at the time of the defendant's quitting, vacating, and abandoning the possession of the same, as hereinafter mentioned, the said messuage or tenement was not in a reasonable, fit, and proper state or condition for *habitation or dwelling therein: and the same was then, and during all the time aforesaid, in that state and condition that the defendant could not reasonably inhabit or dwell therein, or have any beneficial use or occupation of the same, for and by reason of the same being greatly infested, swarmed, and overrun with noxious, stinking, and nasty insects, called bugs, and not for or by reason of any act, default, or omission of the defendant; and the defendant, before or at the time of his making the said agreement, had no

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notice or knowledge thereof; and the defendant afterwards, and after he so entered and became possessed of the said messuage or tenement, and before the said sum of £12 10s., or any part thereof, became due or payable, to wit, on the 25th of June, 1843, discovered and first had notice of the said state and condition of the said messuage or tenement, and of the same being so infested, swarmed, and overrun with bugs as aforesaid; and thereupon the defendant upon such discovery and notice, and before the said sum of £12 10s., or any part thereof, became due or payable, to wit, on the day and year last aforesaid, quitted, vacated, and abandoned the possession, and wholly ceased and abstained from all further occupation or possession of the said messuage or tenement and premises so demised as aforesaid, and then gave notice of the premises to the plaintiff of the defendant's having so quitted, vacated, and abandoned the possession of the said messuage or tenement and premises, and suffered and permitted him to take and have and retain, and he could and might have taken and retained, possession of the said messuage or tenement and premises; and the defendant from thence hitherto hath ceased all further possession, use, or occupation of the said messuage or tenement and premises, and not derived any benefit therefrom and that at and from the time of the commencement of the said term, until the time of his so quitting, vacating, and abandoning possession of the said *messuage or tenement and premises, and [*71] ceasing all further occupation thereof, he had no beneficial use or occupation whatever of the same. Verification.

Thirdly, that he was induced and persuaded to make, and did make and enter into, the said agreement and promise in the said declaration mentioned, by the fraud, covin, and misrepresentation of the plaintiff and others in collusion with him. Verification.

Replication to the second plea, *de injuria*; and to the third, that the defendant was not induced to make, and did not make or enter into the said agreement by the fraud, covin, or misrepresentation in the plea mentioned.

The cause was tried before ROLFE, B., at the sittings in Hilary Term, 1844, when, the facts alleged in the second plea having been fully proved, a verdict was found for the defendant on the issue raised by that plea. C. G. Addison, on a subsequent day in the same term, obtained a rule for judgment *non obstante veredicto*, on the ground that the facts stated in the plea were no answer to the action. Against which rule

Watson and Humfrey showed cause (Feb. 10, 1844). . . .

[72] The law on the subject of implied warranty in the case of specific chattels is thus laid down by PARKE, B., in *Sutton v. Temple*, 17 M. & W. p. 64: " One class of cases is, where the agreement is for a specific chattel in its then state, as in *Parkinson v. Lee*, 2 East, 314 (6 R. R. 429): there there is no implied warranty of its fitness or merchantable quality. Another class of cases is, where a person is employed to make a specific chattel: there the law implies a contract on his part that it shall be fit for the purpose for which it is ordinarily used; and there is an intermediate class of cases, where goods are ordered for a specific

[* 73] purpose, from a person in a * particular department of trade, in which case, also, *Brown v. Edgington*, 2 Man. & Gr. 279; 2 Scott, N. R. 496, is an authority for saying there is an implied undertaking that they shall be fit for that specific purpose." *Bridge v. Wain*, 1 Stark. 504 (18 R. R. 815), and *Shepherd v. Kain*, 5 B. & Ald. 240 (24 R. R. 344), are also authorities in support of that view of the law. Warranties of this nature run through the whole law of this country. If I insure a ship from London to Calcutta, there is an implied warranty that she is seaworthy, and fit for the intended voyage. So in a contract between landlord and tenant on the letting of premises, there is an implied warranty that the tenant will keep the premises in repair: or in the case of a farming lease, that he will manage the farm according to the custom of the country. There is a variety of other cases stated in Com. Dig., Condition in Law (R). There is no sound distinction in this respect between real and personal property. The law is the same on the sale of a chattel and the letting of real property: and if I let a house for the purpose of habitation, it is implied that I warrant that it is fit for that purpose. The nearest case to the present is that of *Smith v. Marrable*,¹ and there it was expressly held to be an implied condition in the letting of a house, that it should be reasonably fit for habi-

[* 75] tation. . . . In * *Sutton v. Temple*, 12 M. & W. p. 64, it was attempted to distinguish the case of *Smith v. Marrable* on the ground that there the demise was of a furnished house,

¹ 11 M. & W. 5, 12 L. J. Ex. 223. That was the case of a furnished house let for five or six weeks. In the above argument reliance was placed on the judgment of PARKE, B., concurred in by ALDERSON,

B., and GURNEY, B., from which it did not appear that the house being furnished made any difference. Lord ABINGER, C. B., however put his judgment expressly on that ground. R. C.

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and therefore it was not merely a contract relating to the realty, but a mixed contract, relating both to the house and the personal chattels of which the furniture was composed. But *Edwards v. Etherington*, Ry. & M. 268; 7 D. & R. 117, and *Collins v. Barrow*, 1 M. & Rob. 112, were not cases of furnished houses; nor was the furniture mentioned in the agreement in *Smith v. Murrable*, or the case put upon that ground; and it is difficult to see any sound distinction in this respect between a house being furnished or unfurnished. If, however, there is such a distinction, the agreement in this case was that the defendant was to have the use of the fixtures, which would bring this case within the same principle. Cases may be cited where a tenant has been held liable for the rent of a house which has been destroyed by fire; but those cases have no application, as they must be understood to be cases where the fire has occurred after the commencement of the tenancy. . . .

But, secondly, it will be said that here there is a [76] covenant by the defendant "to preserve the messuage *and [*77] premises in tenantable repair and condition," and that the defendant therefore took upon himself to remove the nuisance, and to render the house habitable. But there is no covenant to put the premises in repair; the covenant is only to preserve or keep in tenantable repair: which imports that the premises were, at the time of the demise, in a tenantable condition. Such a covenant would not impose on the tenant the duty of removing such a nuisance, existing at the time of the demise. In actions for non-repair, the state of the premises at the time of the demise is a material circumstance to be taken into consideration. *Burdett v. Withers*, 7 Ad. & Ell. 136; 2 Nev. & P. 122 (p. 476, *post*); *Mantz v. Goring*, 4 Bing. N. C. 451; 6 Scott, 277; *nom. Young v. Mantz*. [PARKE, B. Those cases establish that the age and general condition of the house, at the commencement of the tenancy, is to be taken into consideration: and a tenant who enters upon an old house would not be bound to leave it in the same state as if it were a new one. *Stanley v. Twogood*, 3 Bing. N. C. 4; 3 Scott, 313]. The words "to preserve in tenantable repair" necessarily import that the premises are in tenantable repair at the instant of letting them. The word "preserve" can only mean that the tenant is to keep the premises in the same condition as they are given to him. In *Coe v. Clay*, 5 Bing. 440; 3 M. & P. 57, it was held

that he who lets agrees to give possession. Now, that is a condition which is not expressed, but is implied, because the tenant is to occupy the premises. So here there is an implied warranty that the house is fit for habitation. This case, then, is not distinguishable from *Smith v. Maccrable*; for there is no distinction in this respect between a furnished and an unfurnished house. The habitableness of a house is a question of fact for the jury, and here they must be taken to have found that the house was in such a state and condition as to be quite unfit for habitation, [*78] and that without any default or omission on the part * of the defendant. The plea is, therefore, a good answer to the action. — They also referred to *Nale v. Mackenzie*, 1 M. & W. 747.

C. G. Addison, in support of the rule. — The plaintiff is entitled to succeed on several grounds: First, even supposing there be such an implied undertaking on the part of the lessor as that contended for, this plea is no answer to the action. The declaration is founded on a demise of a house and garden ground, into which it alleges the defendant entered, and became and was possessed, until the rent became due; but the plea passes by the demise of the land altogether, and professes to answer the action only in respect of a nuisance to the house; and the plaintiff, upon this ground alone, is entitled to judgment, on the authority of *Richards Le Tarener's* case, Dyer, 56 (a), pl. 15, where it is said, that “if the sea gain upon part of the land demised, or part be burned with wild fire, the entire rent shall issue out of the remainder.” But all the old authorities (whatever may be the effect of the modern cases of *Edwards v. Etherington*, *Collins v. Barrow*, and *Salisbury v. Marshall*, 4 C. & P. 65, which were all actions for use and occupation, and not for the rent) are clear to the point, that the rent reserved on a demise issues out of the land, and is payable in every event, and in every state and condition of the demised premises; for although houses be burned by lightning, or accidental fire, or be thrown down by enemies, and although crops be destroyed by inundation or tempest, yet is the tenant liable to pay the rent so long as the land remains to him, the only answer in law to an action of rent to recover it being an eviction by title paramount. [PARKE, B. Or an eviction by the lessor.] Yes; an eviction by the lessor, or any person claiming by lawful title. Besides, the tenant has not pleaded an evic-

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tion, but states that he quitted the demised premises of *his own accord. In *Paradine v. Jane* (23 Car. I.), Sty. [*79] 47; Aleyn, 27, the defendant pleaded, that Prince Rupert and an army of aliens entered upon the demised premises, and did drive away the defendant's cattle, and expelled him from the lands let to him by the plaintiff, and kept him out, so that he could not enjoy the lands during the term; and it was holden that the plea was insufficient, and that the defendant must pay his rent; for where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract, and the rent is a duty created by the parties upon the reservation. And another reason is added, that as the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses, and not lay the burthen of them on his lessor. So, in the case of *Harrison v. Lord North*, 1 Ch. Ca. 84, where the Parliament, during the civil wars, turned a house into a hospital for sick and maimed soldiers, and so prevented the lessee from having any beneficial occupation thereof for several years, notwithstanding which the lessor brought an action of debt for the rent, no question appears to have been made but that the lessee was bound by law to make good the rent. The lessee consequently brought his bill in equity for relief, on the ground that he had no remedy over against the wrongdoers, because it was an act of force in the Parliament, which had been pardoned by the Act of Oblivion; but it does not appear that he got relief even in equity. So, again, in *Carter v. Cummins*, cited 1 Ch. Ca. 84, where Carter, being the tenant of a wharf, which was carried away by an extraordinary high tide of the river Thames, filed a bill in equity to be relieved against the lessor's claim for rent, all the relief he had was against the penalty of his bond, which had been broken by the non-payment of the rent, and the lessor was ordered to *bring debt only for the rent. [*80] In Brooke's Abr. "Dette," fol. 220, pl. 18, it appears that, to an action of debt for rent, the tenant pleaded, that, by the custom of London, the landlord was bound to repair and uphold the house sufficiently for habitation; and that before the rent accrued due, the house became so ruinous, by reason of a tempest, that the defendant could not abide in it, and the defendant thereupon requested the landlord to amend the house, and he would not,

whereupon the defendant left the house; and it was held, that this was no plea, and constituted no answer in law to the demand for the rent. So, where the lessor is bound by covenant to repair, and does not, the lessee cannot avail himself of the landlord's neglect, as an answer to an action of debt for the rent. Bro. Abr. 'Dette,' pl. 72. In *Monk v. Cooper*, 2 Stra. 763, an action of covenant was brought for non-payment of rent, and the defendant cravedoyer of the lease, in which there was a covenant on the part of the lessee to repair, except the premises should be demolished by fire, and then pleaded that the premises were burnt down, and not rebuilt by the plaintiff during the whole term for which the rent was demanded, and that defendant had no enjoyment of the premises; it was held, on demurrer, that the plea was bad; and the Court said, that if the defendant had sustained any injury, he would have his remedy, but could not set it off against the demand for rent. And in *Pindar v. Ainsley*, cited, 1 T. R. 312 (p. 438, *ante*), Lord MANSFIELD observes, that "the consequence of the house being burned down, is, that the landlord is not obliged to rebuild, but the tenant is obliged to pay the rent during the whole term." The same point was decided in *Belfour v. Weston*, 1 T. R. 310 (p. 436, *ante*), where there was a covenant to pay rent, and a covenant to repair, with an express exception of casualties by fire in the latter covenant. In the case of *Arden v. Pullen*, 10 M. & W. 321, the house became [* 81] * uninhabitable, and utterly useless to the tenant, by reason of original defects in the foundations, and it was held that the tenant could not, in consequence thereof, throw up the house, and refuse to pay rent. "The tenant ought," observes ALDERSON, B., "to examine the house before he takes it." The principle to be deduced from these cases is, that the rent issues out of the land, without reference to the condition of the buildings or structures upon it; and though the buildings may be destroyed or become uninhabitable, the lessee is nevertheless bound to pay his rent. The plea, moreover, in this case, does not show a permanent and incurable obstruction to the beneficial enjoyment of the demised premises, which could not have been got rid of. Floods and inundations frequently render houses temporarily uninhabitable, but such accidents have never been supposed to constitute an answer to a demand for the rent. Even where lands are permanently covered with water, the lessee is not excused, as appears

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by Rolle's Abr., p. 236, where it is said, in such a case, that, "le soile remaine, et le lessee avera le pisce en le eue." But it may be said that these accidents, rendering the demised premises untenable and useless, occurred subsequently to the demise, and do not, therefore, conclusively show that there is no implied condition, on the demise of a house for habitation, that it is in a tenable state at the time of such demise. The plea here alleges that, at the time when the lease was made, and at the time when the defendant entered into and became possessed of the demised premises, the said messuage or tenement was not in a reasonably fit and proper state or condition for habitation. But this averment is perfectly true of every unfurnished house. A house without furniture is not fit for the habitation of a tenant. There cannot, therefore, be any such implied contract or undertaking as that contended for on the demise of a house simply. The landlord lets the mere fabric of the house, without grates or stoves, or any article of * furniture, and it is the duty of [* 82] the tenant to put the house in a habitable condition, unless, indeed, he has contracted for a ready-furnished house, in which case, according to *Smith v. Marrable*, the house is taken under an implied condition that it is properly furnished, and fit for occupation. If the lessor furnishes the house, and by so doing holds it out as fit for immediate occupation, and secures to himself a greatly increased rent in consequence, that is a very different case. As to the arguments drawn from the cases of implied warranties of chattels, those cases rest upon peculiar grounds, and do not apply to the present case. The only warranty known to the law, on demises of realty, is a warranty of the estate or term of years created in the land; there is no warranty as to the particular state or condition of the premises at the time of the demise. "Gar-ranter signifie a defendre son tenant en sa siesin:" Britton fol. 197, b. "Nihil aliud est quam defendere et acquietare tenentem in siesinâ suâ:" Bracton, lib. 5, fol. 480. And so long as the estate created in the land remains, the lessee is bound to pay the rent, whatever may be the particular state or condition of the demised premises. There are several cases in the Year Books, where it became a question, whether, if a man made a lease of a house and other tenements, and, at the time of the demise, the house was so ruinous and in decay as to be in danger of falling, the termor had authority in law to cut down timber to repair it or

not: 5 Ed. IV., Longo Quinto, 100 b. fol. 9; 32 Hen. VIII., fol. 1; Dyer, 36 *a.* and *b.* These cases could not have arisen, if the law implied on the demise of the house such a warranty as that contended for. But it is notorious that ruinous and untenable houses are constantly let to tenants at reduced rents, in order that they themselves may repair them, and re-edify them for their own profit and advantage.

[* 83] * But, even supposing such an implied contract or warranty to exist, the nuisance here complained of forms no answer to the demand for the rent, but must be made the subject of a cross-action against the lessor. It is a clear proposition of law, that if the defendant has derived any benefit from the contract, he is bound to fulfil his part of the engagement, and is driven to his cross-action in respect of the default of the other contracting party. [PARKE, B. That is so.] Here, then, it appears by the plea, that the defendant entered into and became possessed of the demised premises as in the declaration mentioned, which is a benefit to the defendant: *Hunt v. Silk*, 5 East, 449 (2 Smith, 15; 7 R. R. 739), *Harlock v. Gaddes*, 10 East, 555 (10 R. R. 380). But the main point in the present case is, that there is no such implied warranty as that contended for. This is not an action for use and occupation (see 2 H. Bl. 323, 3 R. R. 387), as were *Edwards v. Etherington*, *Collins v. Barrow*, and *Salisbury v. Marshall*, but an action of debt on the implied covenant in law, arising out of the reservation of the rent made on the creation of the estate granted in the land: *Holder v. Taylor*, Hob. 12, Gilb. on Rents, 33, *Nokes's case*, 4 Co. Rep. 80 b., Bacon's Abr., "Leases," 633; and so long as that estate remains, the rent is payable, whatever may be the condition of the demised premises.

The judgment of the Court was now delivered by

PARKE, B. This was a case very fully and ably argued a few days ago, upon showing cause against a rule for judgment *non obstante veredicto*. The declaration is not for use and occupation, but on an agreement in the nature of a lease. [His Lordship here read the declaration and the second plea.] The question is,

whether the plea contains substantially a good answer to [* 84] the plaintiff's * claim for a quarter's rent, becoming due after the defendant quitted.

On the part of the plaintiff, it was insisted that it did not, for

several reasons; the principal one being, that where there is an actual demise of the unfurnished fabric of a specific messuage for a term, there is no contract implied by law on the part of the lessor, that the messuage was at the time of the demise, or should be at the commencement of the term, in a reasonably fit and proper state and condition for habitation (that is, so far as concerned the fabric), though it was demised and let for the purpose of immediate habitation. As we are all of opinion in favour of the plaintiff upon this objection, it is unnecessary to observe upon the others in detail; but it may not be useless to remark, that two of them are very important, and have not been satisfactorily answered; viz., that if such a contract is implied by law, it would be no defence, where the tenant has actually occupied; his remedy would be by a cross-action; and to constitute a valid defence on the ground of the breach of this contract, the law must give also a right to abandon the lease upon the breach of it; that is, to make a defence, the law must imply, not merely a contract, but a condition that the lease should be void if the house was unfit for occupation. The cases cited from Brooke's Abr. "*Dette*," 18 and 72, are decisive, that where the lessor is bound by the custom of London, or by covenant, to repair, and does not, the tenant cannot quit. The other objection, which we think right to notice is, that in this case the house and some garden ground are both demised; and to make the plea good, it must be held, that, if a messuage be taken for habitation, and land for occupation, by the same lease, there is such an implied contract for the fitness of the house for habitation, as that its breach would authorize the tenant to give up both. Whether, if there were such a contract or condition implied by law, generally, it would be implied in this case, where the defendant * agrees to preserve in [* 85] tenantable condition, is a question on which it is quite unnecessary to enter.

The point to be considered, then, is, whether the law implies any contract as to the condition of the property demised, where there is a lease of a certain ascertained subject, being real property, and that lease is made for a particular object.

The question relates to a case of actual demise of a specific tenement, and we have not to inquire what the obligations of a party would be under an executory agreement, to procure a lease of some house for the habitation of another; nor whether the

defendant would not be exonerated on the ground of fraud in the plaintiff, if the plaintiff knew of the defect in the house himself, and that the defendant would not have taken the house if he knew it; nor have we to consider whether the defendant would be responsible, if at the time of the demise there was no house at all, — he may be, by reason of the implied contract for title to a house, not the land merely: which imports that the subject of the contract exists. The simple question is, what is the implied obligation on the part of the landlord to his tenant under a lease of a house for years.

Considering this case without reference to the modern authorities, which are said to be at variance, it is clear that from the word “demise,” in a lease under seal, the law implies a covenant, in a lease not under seal, a contract, for title to the estate merely, that is, for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term; and the word “let,” or any equivalent words (Shepp. Touch. 272), which constitute a lease, have, no doubt, the same effect, but not more. Shepp. Touch. 165, 167. There is no authority for saying that these words imply a contract for any particular state of the property at the time of the demise; and there are many, which clearly show that there is no [*86] implied contract that the property * shall continue fit for the purpose for which it is demised; as the tenant can neither maintain an action, nor is he exonerated from the payment of rent, if the house demised is blown down, or destroyed by fire, *Monk v. Cooper*, 2 Stra. 763, *Belfour v. Weston*, 1 T. R. 310 (p. 436, *ante*), and *Pindar v. Ainsley & Rutter* there cited; or gained upon by the sea, *Tarverner's case*, Dyer, 56 a; or the occupation rendered impracticable by the King's enemies, *Paradine v. Jane*, Aleyn, 26; Sty. 47; or where a wharf demised was swept away by the Thames, *Carter v. Cummins*, cited in 1 Chanc. Ca. 84. In all these cases, the estate of the lessor continues, and that is all the lessor impliedly warrants.

It appears, therefore, to us to be clear upon the old authorities, that there is no implied warranty on a lease of a house, or of land, that it is, or shall be, reasonably fit for habitation or cultivation. The implied contract relates only to the estate, not to the condition of the property.

But the defendant's counsel rely upon some modern decisions

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in support of the positions which they are to maintain. It is not necessary to refer to the cases on the implied warranty of chattels, further than to say that the rule of the common law, which prevails in general (Co. Lit. 102, a), that there is no implied warranty on the sale of specific goods, has had exceptions engrafted upon it, where the goods are ordered from a manufacturer, or tradesman, who impliedly engages to use a proper degree of skill and care in constructing or supplying them. Such are the cases of *Brown v. Edgington*, 2 Man. & Gr. 279; 2 Scott, N. R. 496; *Shepherd v. Pybus*, 3 Man. & Gr. 868; 4 Scott, N. R. 434, and others. These have no bearing on the present case.

But the defendant chiefly rests his case upon the decision of *Smith v. Murrable*, 11 M. & W. 5. My judgment in that case certainly proceeded upon the authority of two previous *decisions, which, though they contained a novel doctrine, [*87] had not been questioned in Westminster Hall, and had received, to a certain degree, the sanction of the Lord Chief Justice TINDAL, in a subsequent case. Those cases were *Edwards v. Etherington*, before Lord TENTERDEN, and afterwards the Court of King's Bench, Ry. & M. 268, and 7 D. & R. 117, and *Collins v. Barrow*, 1 M. & Rob. 112; and the last, that before Lord Chief Justice TINDAL, was *Salisbury v. Marshall*, 4 Car. & P. 65; and I thought they established the doctrine, not merely that there was an implied contract on the part of the lessor that the house demised should be habitable, but an implied condition, that the lease should be void if it were not, and the tenant chose to quit. From the full discussion which those cases have now undergone, on the present argument, and that in the recent case of *Sutton v. Temple*, 12 M. & W. 64, I feel satisfied they cannot be supported, if the reports of them are correct; and we all concur in opinion that they are not law, — an opinion strongly intimated, in the case of *Sutton v. Temple*, in which this Court decided, that there was no implied warranty of condition or fitness for a particular purpose on a lease of aftermath.

We are under no necessity of deciding in the present case, whether that of *Smith v. Murrable* be law or not. It is distinguishable from the present case on the ground on which it was put by Lord ABINGER, both on the argument of the case itself, but more fully in that of *Sutton v. Temple*; for it was the case of a demise of a ready-furnished house for a temporary residence at a

watering-place. It was not a lease of real estate merely. But that case certainly cannot be supported on the ground on which I rested my judgment.

We are all of opinion, for these reasons, that there is no contract, still less a condition, implied by law on the demise of [* 88] real property only, that it is fit for the purpose for * which it is let. The principles of the common law do not warrant such a position; and though, in the case of a dwelling-house taken for habitation, there is no apparent injustice in inferring a contract of this nature, the same rule must apply to land taken for other purposes, — for building upon, or for cultivation; and there would be no limit to the inconvenience which would ensue. It is much better to leave the parties in every case to protect their interests themselves, by proper stipulations, and if they really mean a lease to be void by reason of any unfitness in the subject for the purpose intended, they should express that meaning.

Judgment for the plaintiff.

ENGLISH NOTES.

The principles which regulate the liability of the lessor are thus stated by Lord ROMILLY, M. R., in *Chappell v. Gregory* (1863), 34 Beav. 250. "A promise by a lessor to put the house into a complete state of repair before the lease is executed, and upon the faith of which a lease is taken, is a distinct engagement which must be fulfilled by him. But, in the absence of such a promise, a man who takes a house from a lessor, takes it as it stands, it is his business to make stipulations beforehand, and if he does not, he cannot say to the lessor, 'this house is not in a proper condition, and you or your builder must put it into a condition which makes it fit for my living in.'" A representation that an unfurnished house is fit for immediate occupation made before the commencement of a tenancy is a warranty, and entitles the tenant to rescind if untrue. *Burn v. Harrison* (C. A. 1886), 3 Times L. R. 146. That case is an illustration of the rule deduced from *Behn v. Burness* (Ex. Ch. 1863), No. 44 of "Contract," 6 R. C. 492. "Statements intended to be a substantive part of the contract, and which are essential to its primary objects, constitute a warranty in the sense of a condition on the failure or non-performance of which the other party may repudiate the contract *in toto*."

In *Burn v. Harrison*, *supra*, the Court of Appeal expressly left open the question whether the case of *Smith v. Marrable* (cited in the ruling case, and further noted below), would or would not apply where it was

understood by both parties that an unfurnished house was required for immediate occupation. It is only in a Court of review that the point is open, if at all. *Keates v. Earl Cadogan* (1851), 10 C. B. 591, 20 L. J. C. P. 76. In that case the declaration alleged that the defendant knew, and that the plaintiff did not know, that the house was in a ruinous condition, and the plaintiff "proposed to the defendant that the defendant should lease to him, and that the plaintiff should take from him as his tenant for the purpose of the plaintiff immediately occupying and dwelling in the same," the demised property. It was held on demurrer, that this declaration was bad, and that the plaintiff would have to show, in order to entitle him to succeed, that the defendant knew that the intended lessee was influenced by his belief that the house was sound in agreeing to take it, or that the conduct of the defendant amounted to a deceit practised upon the plaintiff. In the second principal case also an immediate occupation was apparently contemplated. The principle stated in the same case is accepted by Lord BLACKBURN, without any expression of dissent and without limitation, in *Searle v. Laverick* (1874), L. R., 9 Q. B. 122, 131, 43 L. J. Q. B. 43, 30 L. T. 89, 22 W. R. 367; and in *Westropp v. Elligott* (H. L. 1884), 9 App. Cas. 815, 827, 52 L. T. 147. The principle is also accepted in *Manchester Bonded Warehouse Co. v. Carr* (1880), 5 C. P. D. 507, 49 L. J. C. P. 809, 43 L. T. 476, 29 W. R. 354. Upon a contract to hire a specified vessel, there is no implied undertaking by the shipowner that the vessel is reasonably efficient for the purposes of the voyage contemplated. *Robertson v. Amazon Tug Co.* (C. A. 1881), 7 Q. B. D. 598, 51 L. J. Q. B. 68, 46 L. T. 146, 30 W. R. 308.

The legislature has introduced an implied condition into contracts for letting houses for habitation by the working classes. By s. 75 of the Housing of the Working Classes Act 1890 (53 & 54 Vict. c. 70), s. 75, reproducing sect. 12 of the earlier Act of 1885 (48 & 49 Vict. c. 72), it is enacted that in such contracts there shall be implied "a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation."

There is no implied undertaking on the part of the landlord that the house shall continue fit during the term, and the landlord is not, in the absence of an express contract, bound to do repairs during the continuance of the term. *Gott v. Gandy* (1853), 2 Ell. & Bl. 845, 23 L. J. Q. B. 1; *Colebeck v. Girdlers' Co.* (1876), 1 Q. B. D. 235. The law in Scotland is the same. *Bayne v. Walker* (H. L. 1815), 3 Dow. 233, 15 R. R. 53.

This exemption of the landlord is affected by the provisions of the Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 94 and following, and the Public Health (London) Act 1891 (54 & 55 Vict. c. 76), ss. 11

and 121, so far as regards nuisances. The landlord may however by contract throw the liability upon the tenant. Public Health Act 1875, s. 104; Public Health (London), Act, 1891, s. 121.

Where a house has become dilapidated during the term it has sometimes been attempted to fix the landlord with liability, on the principle that a man cannot derogate from his own grant.

In *Grosvenor Hotel Co. v. Hamilton* (C. A. 1894), 1894, 2 Q. B. 836, 63 L. J. Q. B. 661, 71 L. T. 362, 42 W. R. 626, the defendant had demised lands, on which stood a house, to the plaintiff company. The defendant, by working engines on adjacent property, caused vibration which wrecked the house. The defendant attempted to show that the house was at the date of its destruction, and at the date of the demise, in an unstable condition, but this contention was rejected on the ground above mentioned. The judgment in this case is rested on tort and not in contract. The Court also distinguished the case from their earlier decision in *Robinson v. Kilvert* (C. A. 1889), 41 Ch. D. 88, 58 L. J. Ch. 392, 61 L. T. 60, 37 W. R. 545. In that case the defendants leased a part of the house to the plaintiff, who used the same to store paper. The defendants then commenced on their part of the premises another business which required heat, and raised the temperature of the plaintiff's floor, which had the effect of causing the plaintiff's paper to become deteriorated. The act complained of did not amount to an actionable nuisance, and an application for an injunction against the landlord, to restrain him from continuing his user of the part of the house in the manner complained of, was refused.

Miller v. Hancock (C. A. 1893), 1893, 2 Q. B. 177, 69 L. T. 214, 41 W. R. 578, rests on a different principle, and belongs to that class of cases which are sometimes called "trap" cases. The principle of these cases is this, that where a man invites another to come upon his property, he impliedly warrants that there shall be no hidden dangers or traps. In *Miller v. Hancock*, the defendant was the owner of a building which he let out in tenements, but the staircase by which access was obtained to the different rooms remained in the possession of and under the control of the defendant. The plaintiff, who was using the staircase as a means of access to a room occupied by a tenant, sustained injuries through the defective condition of one of the stairs. It was held that the defendant was liable by implication to repair the stairs and was bound to compensate the plaintiff. On the other side of the line appear such cases as *Iray v. Hedges* (1882), 9 Q. B. D. 80. In that case the landlord of a house which was let out in tenements, permitted the tenants to use the roof for the purpose of drying their linen. A rail ran round the outer edge of the roof, but was known to the landlord to be out of repair. The plaintiff went on the roof to

remove some linen, when he slipped and fell against the rail, which gave way, and the plaintiff fell into the courtyard below. In this case the landlord was held not to be liable, on the ground that the user of the roof was not a necessary part of the holding, as a staircase or passage giving access to rooms would be.

Where a furnished house or apartments is or are let for immediate occupation, the tenant is entitled to assume that the same is or are fit for habitation, and if this is not the case, he may put an end to his tenancy. *Smith v. Marrable* (1843), 11 M. & W. 5, 12 L. J. Ex. 223 (the well-known bug case); *Wilson v. Finch Hatton* (1877), 2 Ex. D. 336, 46 L. J. Ex. 489, 36 L. T. 473, 25 W. R. 537 (defective drains).

There is, however, no implied agreement that the property will continue fit for habitation during the term. *Sarson v. Roberts* (C. A. 1895), 1895, 2 Q. B. 395, 73 L. T. 174, 43 W. R. 690.

Where the landlord agrees to do the repairs, and fails to perform that obligation, the tenant cannot throw up the lease, but his remedy against the landlord is by a cross-action. *Hunt v. Silk* (1804), 5 East, 449, 2 Smith, 15, 7 R. R. 739; *Manchester Bonded Warehouse Co. v. Carr* (1880), 5 C. P. D. 507, 49 L. J. C. P. 809, 43 L. T. 476, 29 W. R. 354.

Where the landlord is bound to repair he is entitled to notice from the tenant of want of reparation. *Manchester Bonded Warehouse Co. v. Carr*, *supra*.

A landlord bound to repair is responsible for damages suffered by a third person from want of repair. *Payne v. Rogers* (1794), 2 H. Bl. 350, 3 R. R. 415; *Sandford v. Clarke* (1888), 21 Q. B. D. 398, 57 L. J. Q. B. 507; *Miller v. Hancock* (C. A. 1893), 1893, 2 Q. B. 177, 69 L. T. 214, 41 W. R. 578.

Questions relating to leases under powers whether contained in a deed or will or conferred by statute, may be here briefly adverted to.

In *Doe d. Ellis v. Sandham* (1787), 1 T. R. 705, 1 R. R. 369, where the tenant for life under a will was empowered to grant leases for years reserving the usual covenants, a lease containing a proviso that in case the premises were blown down or burnt the lessor should rebuild, otherwise the rent should cease, was held void, — the jury having found that such proviso was unusual. A bill was subsequently filed to rectify the lease so as to bring it within the power, but the bill was dismissed. *Medwin v. Sandham* (1789), 3 Swanston, 685. The Chancery Division would now (under the Act 12 & 13 Viet. c. 26, s. 2) have power to treat a lease, invalid by reason of deviation from the terms of the power, as a contract in equity for such a lease as might have been granted under the power. To enable this to be done, however, the lease must have been granted *bonâ fide*, and there must have been an entry by the lessee,

or those claiming under him. Acceptance of rent operates as a confirmation. *Ibid.* s. 3.

Where, however, it is in accordance with local usage to insert a covenant by the landlord to do the repairs, the decision in *Doe d. Ellis v. Sandham, supra*, would not apply, and the donee of the power might throw this obligation on the reversioners. *Doe d. Bromley v. Bettison* (1810), 12 East, 305, 11 R. R. 385.

In a lease (not being a lease from year to year), in exercise of the powers of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), it would seem that the lessee could not be relieved from liability to repair. *Davies v. Davies* (1888), 38 Ch. D. 499, 57 L. J. Ch. 1093, 58 L. T. 514, 36 W. R. 399. There is nothing in the Settled Land Acts, 1882 to 1890, which would entitle the lessee for life or lives or for years to be relieved from liability for permissive waste, according to the rule laid down in *Yellowby v. Gower* (1855), 11 Ex. 274, 24 L. J. Ex. 289. It is however provided by the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13, that capital moneys may be laid out in "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let." These words have been held to authorise the money to be expended in the manner indicated in the case of an immediate or prospective tenancy. *Re De Teissier's Settled Estate* (1893), 1893, 1 Ch. 153, 62 L. J. Ch. 552, 68 L. T. 275, 41 W. R. 184; *Re Lord Gerard's Settled Estates* (C. A. 1893), 1893, 3 Ch. 252, 63 L. J. Ch. 23, 69 L. T. 393. As regards the mansion-house, capital moneys may be laid out in rebuilding the mansion-house: 53 & 54 Vict. c. 69, s. 13 (IV). But the consent of the trustees or an order of the Court would have to be obtained (*ibid.* s. 10), unless the property fell within the description in subsection 3.

AMERICAN NOTES.

The doctrine of the Rule is everywhere accepted in this country, except as it is in some States modified by Statute. *McAlpin v. Powell*, 70 New York, 126; 26 Am. Rep. 555; *Mullen v. Rainear*, 45 New Jersey Law, 520; *Clark v. Babcock*, 23 Michigan, 161; *Cole v. McKay*, 66 Wisconsin, 500; 57 Am. Rep. 293; *Kreuger v. Ferrant*, 29 Minnesota, 385; 43 Am. Rep. 223; *Eblin v. Miller*, 78 Kentucky, 731; *Weinstein v. Harrison*, 66 Texas, 546; *Fishback v. Woodruff*, 51 Indiana, 102; *Peterson v. Smart*, 70 Missouri, 34; *Hill v. Beatty*, 61 California, 292; *Scott v. Simons*, 54 New Hampshire, 426; *Brown v. Barrington*, 36 Vermont, 10; *City Council v. Morehead*, 2 Richardson Law (So. Car.), 430; *Kahn v. Love*, 3 Oregon, 206; *Peoria v. Simpson*, 110 Illinois, 291; *Roth v. Bellingrath*, 71 Alabama, 55; *Libby v. Telford*, 48 Maine, 316; 77 Am. Dec. 229; citing the principal case, *Kline v. Jacobs*, 68 Pennsylvania State, 57; *Jaffe v. Hartman*, 56 New York, 398; *City of Lowell v. Spaulding*, 1 Cushing (Mass.), 277; 50 Am. Dec. 775; *Shindelbeck v. Moon*, 32 Ohio St.

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264; 30 Am. Rep. 584; *Mellen v. Morrill*, 126 Massachusetts, 545; 30 Am. Rep. 695; *Bowe v. Hunking*, 135 Massachusetts, 380; 46 Am. Rep. 471. On the lease of a building for exhibition purposes, the galleries being designed only for a limited number of spectators, there is no implied warranty that they shall be safe for a turbulent crowd. *Edwards v. N. Y. &c. R. Co.*, 98 New York, 245; 50 Am. Rep. 659; *Ward v. Fagin*, 101 Missouri, 669; 10 Lawyers' Rep. Annotated, 147; *Kline v. McLain*, 33 West Virginia, 32; 5 Lawyers' Rep. Annotated, 400; *Gregor v. Cady*, 82 Maine, 131; 17 Am. St. Rep. 466; *Cowen v. Sunderland*, 145 Massachusetts, 363; 1 Am. St. Rep. 469; *Davidson v. Fischer*, 11 Colorado, 583; 7 Am. St. Rep. 297; *Murray v. Albertson*, 50 New Jersey Law, 167; 7 Am. St. Rep. 787; *Turner v. Townsend*, 42 Nebraska, 376; *Daly v. Wise*, 132 New York, 306; 16 Lawyers' Rep. Annotated, 236, citing *Hart v. Windsor*.

This doctrine applies to one letting the lower and retaining the upper story, — he is under no implied obligation to keep his own in repair. *Jones v. Millsaps*, 71 Mississippi, 10; 23 Lawyers' Rep. Annotated, 155. *Contra*, where the landlord employed a carpenter to put a skylight in the roof, and it was done so negligently as to cause a leakage. *Glickauf v. Mawer*, 75 Illinois, 289; 20 Am. Rep. 238; same principle, *Toole v. Becket*, 67 Maine, 544; 24 Am. Rep. 54.

But a landlord cannot escape the consequence of concealing a nuisance. So a landlord letting premises with knowledge that they are so out of repair as to be dangerous, may be liable for injury to the tenant in consequence. *Cutler v. Hamlen*, 147 Massachusetts, 471; 1 Lawyers' Rep. Annotated, 429; *Kern v. Myll*, 80 Michigan, 525; 8 Lawyers' Rep. Annotated, 682 (concealed well under house, partly filled up); *Maywood v. Logan*, 78 Michigan, 135; 18 Am. St. Rep. 431 (dead dog in well); *Coke v. Gutkese*, 80 Kentucky, 598; 44 Am. Rep. 499; *Cesar v. Karutz*, 60 New York, 229; 19 Am. Rep. 164; *Minor v. Sharon*, 112 Massachusetts, 477; 27 Am. Rep. 122 (cases of infection by small-pox). In Pennsylvania it has been held that one who was guilty of gross neglect in constructing and renting an insecure warehouse, was liable to one whose goods stored therein were injured by its fall. *Carson v. Godley*, 26 Penn. St. 111; 67 Am. Dec. 404. The Court reviewed the English decisions, and grounded their decision on the maxim, *sic utere*, etc., observing: "With his eyes wide open to the fact that the government would use his storehouse for heavy storage, he let them have it knowing that it was unfit for such use, and he inserted no word of caution or restraint in the lease. . . . He did not build a strong storehouse, and he did not forbid heavy storage. Tempted by a large rent, he permitted his building to be subjected to burdens too heavy for it to bear, though lighter than the tenant had the right to impose, and herein is the ground of his liability." So if being informed that a building is out of repair, he undertakes, even gratuitously, to put it in repair, but does it so negligently and unskilfully that injury ensues to the tenant's wife, he is liable. *Gill v. Middleton*, 105 Massachusetts, 477; 7 Am. Rep. 548. This doctrine has been extended to the case of an inn-keeper, taking a guest into his inn when he knows it to be infected with small-pox. *Gilbert v. Hoffman*, 66 Iowa, 205; 55 Am. Rep. 263, and note, 265. But not so as to a third person, as a guest at a hotel. *Fellows v. Gilhuber*,

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82 Wisconsin, 639; 17 Lawyers' Rep. Annotated, 577. But in *Bertie v. Flagg*, 161 Massachusetts, 504, it was held that a landlord is not liable for a defect in a drain, which in the course of a tenancy at will is discovered by him, nor for failing to disclose it to the tenant ignorant of it. The Court distinguish *Minor v. Sharon*, and lay stress on the fact that it was an ordinary defect and an ordinary danger, and that the discovery was made during the tenancy, and conclude that there was no obligation on the landlord to repair it.

One letting rooms in the same building to different tenants is bound to keep the common stairway in repair: *Looney v. McLean*, 129 Massachusetts, 33; 37 Am. Rep. 295. But *contra* as to one who comes there without invitation to attend a wake: *Hart v. Cole*, 156 Massachusetts, 475; 16 Lawyers' Rep. Annotated, 557. So the landlord may be liable for failure to furnish proper light: *Murwedel v. Cook*, 151 Massachusetts, 235. Or for overflow of water-closet in upper story: *Marshall v. Cohen*, 41 Georgia, 489; 9 Am. Rep. 170. So the landlord is liable in damages to a tenant of a tenement-house whose foot is caught in a hole in a carpet on the stairs: *Peil v. Reinhart*, 127 New York, 381; 12 Lawyers' Rep. Annotated, 843; and so in case of a fall of plaster from a hall ceiling in a tenement house: *Dollard v. Roberts*, 130 New York, 269; 11 Lawyers' Rep. Annotated, 238; *Schilling v. Abernethy*, 112 Pennsylvania State, 137; *Sawyer v. McGillicuddy*, 81 Maine, 318; 10 Am. St. Rep. 260. In the last two New York cases the landlord's knowledge of the defect was deemed essential. The landlord is not liable however for consequences of ice and snow on exterior steps of a tenement house: *Woods v. Naumkeag S. C. Co.*, 131 Massachusetts, 357; 45 Am. Rep. 344; *Parcell v. English*, 86 Indiana, 31; 44 Am. Rep. 255; unless brought about by his negligent act: *Watkins v. Goodail*, 138 Massachusetts, 533. In *Humphrey v. Wait*, 22 U. Can. C. P. 580, the landlord was held not liable for injury to the tenant by stepping through a hole in the floor of a common passage. See valuable notes, 23 Lawyers' Rep. Annotated, 155, 14 *ibid.* 228.

The doctrine of *Smith v. Marrable*, 11 M. & W. 5, that a warranty of fitness is implied on the letting of a furnished house, was denied in *Fisher v. Lighthall*, 1 Mackey (Dist. of Columbia), 82; 51 Am. Rep. 258, citing *Hart v. Windsor*, and *Wilson v. Finch-Hatton*, 2 Ex. Div. 336, observing: "If we had to establish the law for the first time we might think it was a reasonable condition for the Courts to enforce, that property for human occupation should be understood between the parties to be at least healthy, yet parties choose to make their own contracts and we must leave them to that." Citing *Hart v. Windsor*. Chief Justice SNOW says, in *Dutton v. Gerrish*, 9 Cushing (Mass.), 89, 55 Am. Dec. 15, that the authority of *Smith v. Marrable* "has been much shaken, if not wholly overruled, so far as it applies to real estate, by the subsequent cases." The English cases, including *Hart v. Windsor*, are cited in *Franklin v. Brown*, 118 New York, 110; 16 Am. St. Rep. 714, and their doctrine disapproved, *obiter*, the Court distinguishing the case at bar on the grounds that the lease was for a year, and the cause of complaint did not arise on the premises but was a neighbouring nuisance. The same line of cases however is cited and followed in *Ingalls v. Hobbs*, 156 Massachusetts, 318; 32 Am. St. Rep. 160; 16 Lawyers' Rep. Annotated, 51, a case of bugs, like *Smith v. Marrable*, on a lease of a furnished house for the summer

of 1890. The Court said: "It is well settled, both in this commonwealth and in England, that one who lets an unfurnished building to be occupied as a dwelling-house does not impliedly agree that it is fit for habitation. *Dutton v. Gerrish*, 9 Cush. 89; 55 Am. Dec. 45; *Foster v. Peyser*, 9 Cush. 242; 57 Am. Dec. 43; *Stevens v. Pierce*, 151 Mass. 207; *Sutton v. Temple*, 12 Mees. & W. 52; *Hart v. Windsor*, 12 Mees. & W. 68. In the absence of fraud or a covenant, the purchaser of real estate, or the hirer of it, for a term however short, takes it as it is, and determines for himself whether it will serve the purpose for which he wants it. He may, and often does, contemplate making extensive repairs upon it to adapt it to his wants; but there are good reasons why a different rule should apply to one who hires a furnished room or a furnished house for a few days or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than when there is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well-understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use. It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine *caveat emptor*, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time. This distinction between furnished and unfurnished houses, in reference to the construction of contracts for letting them, when there are no express agreements about their condition, has long been recognized in England, where it is held that there is an implied contract that a furnished house, let for a short time, is in proper condition for immediate occupation as a dwelling. *Smith v. Marrable*, 11 Mees. & W. 5; *Wilson v. Finch-Hatton*, 2 Ex. Div. 336; *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. Div. 507; *Sutton v. Temple*, 12 Mees. & W. 52; *Hart v. Windsor*, 12 Mees. & W. 68; *Bird v. Lord Greidle*, 1 Cababe & E. 317; *Charsley v. Jones*, 53 J. P. (Q. B.) 280.

"In *Dutton v. Gerrish*, 9 Cush. 89, 55 Am. Dec. 45, Chief Justice Shaw recognizes the doctrine as applicable to furnished houses; and in *Edwards v. McLean*, 122 N. Y. 302, *Smith v. Marrable*, 11 Mees. & W. 5, and *Wilson v. Finch-Hatton*, 2 Ex. Div. 336, cited above, are referred to with approval, although held inapplicable to the question then before the Court. See *Cleves v. Willoughby*, 7 Hill, 83; *Franklin v. Brown*, 118 N. Y. 110; 16 Am. St. Rep. 741.

"We are of opinion that in a lease of a completely furnished dwelling-house for a single season, at a summer watering-place, there is an implied agreement that the house is fit for habitation, without greater preparation than one hiring it for a short time might reasonably be expected to make in appropriating it to the use for which it was designed."

No. 4. — *Gibson v. Wells*, 1 Bos. & P. (N. R.) 290. — Rule.

No 4. — GIBSON *v.* WELLS.

(c. P. 1805.)

RULE.

A TENANT at will is not liable for permissive waste.

Gibson v. Wells.

1 Bos. & P. (N. R.) 290-292 (8 R. R. 801).

Landlord & Tenant. — Permissive Waste.

[290] An action on the case does not lie for permissive waste.

This was an action on the case in the nature of waste. The first count stated, that the defendant, on the 1st March, 1803, and from thence continually, hitherto held and enjoyed, for a certain term not yet determined, a messuage of the plaintiff; that the plaintiff was seised in fee thereof, and that the defendant, well knowing the premises, broke down divers perches of a certain wall of the said messuage, and kept the same broken down, &c., by reason whereof the plaintiff's reversionary interest was injured. The second count stated, that the defendant, on the 1st March, 1803, and from thence continually, held and enjoyed one other messuage of the plaintiff upon, among others, the condition following; that the defendant should not, during the said tenancy, suffer the said messuage to be out of tenantable repair for want of the necessary repairing; that the plaintiff was seised in fee, yet that the defendant, contriving to prejudice him in his reversionary interest, suffered the said messuage to be out of tenantable repair, for want of the necessary repairing thereof in the roofing, walls, windows, &c. whereby the plaintiff's reversionary interest was injured. The third count stated the defendant to hold on the following condition, that the defendant should not, during the said tenancy, wilfully suffer the said messuage to be out of tenantable repair, for want of such repair as tenant from year to year ordinarily ought to do. The fourth was upon the following condition, that the defendant should not, during the said tenancy, suffer the said messuage to be out of repair for want of proper tiling in the roof, or of proper glass in the windows. And the last upon the following condition, that the defendant should not nor would wilfully misuse the said premises, or neglect any

No. 4. — *Gibson v. Wells*, 1 Bos. & P. (N. R.) 291, 292.

*repairs he ought to do thereto, so as to prejudice the [*291] plaintiff's reversionary interest. Breaches were assigned in the three last counts upon the respective conditions in the same manner as in the second count. The defendant pleaded not guilty.

At the trial before Sir JAMES MANSFIELD, C. J., at the Westminster sittings after last Easter term, it was proved, that the defendant had occupied the house in question for a considerable time as tenant at will to the plaintiff, who was seised in fee thereof, and that the house was much out of repair. But his Lordship, being of opinion that the dilapidations proved amounted only to permissive waste, nonsuited the plaintiff, saying that although an action on the case in the nature of waste might be maintained for commissive waste, yet that he had never known an instance of such an action being maintained for permissive waste only.

Bayley, Serjt., moved for a rule to show cause why the nonsuit should not be set aside and a new trial be granted, and urged that, as there was no doubt that an action on the case might be maintained for acts of commission, there was no reason why such an action should not be maintainable for neglect amounting to waste at law; that the foundation of the action was, that an injury was done to the reversion by the default of the tenant, and the reversion was equally injured whether the dilapidations were occasioned by commission or neglect.

Sir JAMES MANSFIELD, C. J. There is no doubt but an action on the case may be maintained for wilful waste: but at common law, if any part of the premises are suffered to be dilapidated, it amounts to permissive waste; and if this action be maintainable, such an action might be brought against a tenant at will who omitted to repair a * broken window. I think this [*292] action is an innovation, and I am not disposed to encourage it.

The other Judges concurring,

Bayley, Serjt., took nothing by his motion.

On a subsequent day, Bayley mentioned this case again, and referred the Court to several precedents of counts in declarations for permissive waste similar to those in the present case; but it appearing that they had been joined with counts for waste wilfully committed, and that on the point now in question no express decision could be produced,

The Court adhered to their former opinion, and refused a rule to show cause.

ENGLISH NOTES.

The writ of waste which is so often mentioned in the earlier cases had become obsolete before the commencement of the present century. See Hill on Real Actions. When actions were commenced in the Common Law Courts, the proceedings were usually commenced by an action on the case. When recourse was had to Courts of Equity, the remedy was by injunction. The writ of waste was abolished in the year 1833 by Statute 3 & 4 Will. IV. c. 27, ss. 36 & 37.

The law is thus summed up by the late Mr. Cruise. "Tenants at will . . . not being within the Statute of Gloucester (6 Ed. I. c. 5), no action of waste lies against them, and as to permissive waste, there is no remedy against them, for they are not bound to repair or sustain houses like tenants for years." 1 Cruise, Dig. tit. IX., ch. 1, s. 11. The authority cited by Cruise for this proposition is *The Countess of Shrewsbury's Case* (1600), 5 Co. Rep. 13 *b.*, Cro. Eliz. 777, which is apparently the earliest case. The material part of the report is as follows: "The Countess of Shrewsbury brought an action on the case against Richard Crompton, a lawyer of the Temple, and declared that she leased to him a house at will, *et quod ille tam negligenter et improvide custodivit ignem suum, quod domus illa combusta fuit*; to which the defendant pleaded not guilty, and was found guilty, &c. And it was adjudged that for this permissive waste no action lay, against the opinion of Brooke, in the abridgment of the case of 48 E. III. 35, waste 52. And the reason of the judgment was, because at the common law no remedy lay for waste, either voluntary or permissive, against a lessee for life or years, because the lessee had interest in the land by the act of the lessor, and it was his folly to make such lease, and not restrain him by covenant, condition, or otherwise, that he should not do waste. So, and for the same reason, a tenant at will shall not be punished for permissive waste. But the opinion of Littleton is good law, fol. (15) 152. If a lessee at will commits voluntary waste, *scil.* in abatement of the houses, or in cutting of the woods, there an action of trespass lies against him. For, as it is said in 2 & 3 Ph. & M., Dyer 122 *b.*, where tenant at will takes upon him to do such things which none can do but the owner of the land, these amount to the determination of the will, and of his possession, and the lessor shall have a general action of trespass notwithstanding any entry; . . . wherefore it was awarded, that the plaintiff take nothing by her bill." The principal case is also supported by the judgment of the Court in *Harnett v. Maitland* (1847), 16 M. & W. 257, 16 L. J. Ex. 134. "It is agreed on all hands," said

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PARKE, B., "that a tenant at will would not be liable to an action for permissive waste." To the same effect is *Pantam v. Isham* (1702), 1 Salk. 19, 3 Lev. 359.

A tenant by *elegit* is not liable for permissive waste. *Dean, &c. of Worcester's Case* (1606), 6 Co. Rep. 37. If a tenant by *elegit* committed an act of waste, the proper remedy was not a writ of waste, but an action for an account. Bro. Abr. tit. Waste, pl. 78.

A legal tenant for life is not liable to an action for permissive waste. *In re Cartwright, Acis v. Newman* (1889), 41 Ch. D. 532, 58 L. J. Ch. 590, 60 L. T. 891. The case will give a clue to the more important cases on the question of liability for permissive waste, and will be dealt with more at large under the ruling case of *Vane v. Lord Barnard* (or *Lord Bernard's Case*), No. 9, p. 488, *post*.

AMERICAN NOTES.

This doctrine is accepted by the American text writers. The principal case is cited by Wood on Landlord and Tenant, sect. 424, but no American cases in point are cited.

No. 5. — HORSEFALL *v.* MATHER.

(N. P. 1815.)

RULE.

A TENANT from year to year is bound to use the premises in a husbandlike manner, but is not, in the absence of express stipulation, liable for dilapidations arising in the course of such use.

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Holt, N. P., 7-9 (17 R. R. 589).

Landlord and Tenant. — Tenant from Year to Year. — Dilapidations.

Tenant at will is not liable to general repairs: he is bound to use the [7] premises in a husbandlike manner, but no farther.

This was an action of assumpsit brought against the defendant, who had been tenant from year to year to the plaintiff, for dilapidations and injury to the premises recently in his occupation. The declaration stated, that in consideration that the [* 8]

defendant had become and was tenant to the plaintiff of a certain messuage, &c., he undertook to keep the same in good and tenantable repair; to uphold and support, and to deliver up the same to the plaintiff at the expiration of his term, in the condition in which he received it.

It appeared that the defendant had occupied the house about three years at a rack rent. It was in good repair when he entered it; but, upon quitting possession, he had in some degree damaged the ceiling, the walls, and other parts of the house, by removing the shelves and fixtures, and had not left the house in a good tenantable condition. The plaintiff had been put to some small expense in refitting it for the occupation of a new tenant. The plaintiff gave no other evidence than the occupation of the premises by the defendant.

Lens, Serj., for the plaintiff, contended, that there was a general assumpsit in law, founded in the relation of landlord and tenant, that the latter should keep the premises in tenantable condition; and that this obligation attached upon a tenant from year to year, or a tenant at will. He relied upon *Ferguson v. Black*, 2 Esp. 590 (5 R. R. 757).

Best, Serj. *contra*: The declaration states the implied assumpsit in terms too large. This is an extensive obligation, which, in the absence of a specific contract, does not result from the relation of landlord and tenant. An implied promise to conduct himself as a good tenant is very different from an implied promise to [* 9] keep premises in * repair, to uphold and maintain them, and to surrender them, at the expiration of the tenancy, in that condition.

GIBBS, C. J. :—

I am of opinion that the plaintiff is not entitled to recover. He has laid his ground too broadly. The defendant is answerable to some extent, but not to the extent stated in the declaration. Can it be contended that a tenant at will is answerable if premises are burned down? Would he be bound to rebuild if they became ruinous by any other accident? And yet, if bound to repair generally, he might be called upon to this extent. He is bound to use the premises in a husbandlike manner; the law implies this duty and no more. I am sure it has always been holden that a tenant from year to year is not liable to general repairs.

Plaintiff nonsuited.

ENGLISH NOTES.

The mere relation of landlord and tenant raises an implied promise on the part of the tenant to manage or deal with the property demised in a husbandlike and tenantable manner; *Powley v. Walker* (1793), 5 T. R. 373, 2 R. R. 619 (a lease of a farm); *Holford v. Dunnett* (1841), 7 M. & W. 348, 10 L. J. Ex. 101 (a lease of a house, garden, orchard and appurtenances); *Dietrichsen v. Giubilei* (1845), 14 M. & W. 845, 15 L. J. Ex. 73 (lease of a house).

The tenant must farm his land according to the custom of the country. *Wigglesworth v. Dallison* (1779), 1 Doug. 210, 1 Smith Lead. Cas. 569, 9th ed. Where there is a written contract, the custom will be excluded if the terms of the lease are inconsistent with the custom or exclude the operation of the custom. *Webb v. Plummer* (1819), 2 B. & Ald. 746, 21 R. R. 479; *Roberts v. Barber* (1833), 1 Crompt. & M. 808, 2 L. J. Ex. 266; *Hutton v. Warren* (1836), 1 M. & W. 466. Where the custom is not excluded in express terms or by necessary implication it will be deemed incorporated in the contract. *Senior v. Armytage* (1816), Holt, 197, 17 R. R. 627; *Tucker v. Linger* (H. L. 1883), 8 App. Cas. 508, 52 L. J. Ch. 941, 49 L. T. 373, 32 W. R. 40.

The terms upon which the tenant holds may be collected from a written document which is void as a lease. *Richardson v. Gifford* (1834), 1 Ad. & El. 52; *Beale v. Saunders* (1837), 3 Bing. N. C. 850, 6 L. J. C. P. 283; *Lee v. Kay* (1854), 6 Ex. 662, 22 L. J. Ex. 198. In *Richardson v. Gifford*, *supra*, it was contended that a covenant to repair was inconsistent with a tenancy from year to year, implied from the payment of rent under a demise void by the Statute of Frauds, according to the principle of *Doe d. Rigge v. Bell* (1793), 5 T. R. 471, 2 R. R. 642, 2 Smith's Lead. Cas. 110, 9th ed.; but the Court rejected the contention.

Where a tenant holds over he will be presumed to hold upon the terms as to repair or otherwise contained in the original demise. *Digby v. Atkinson* (1815), 4 Camp. 275, 16 R. R. 792; *Torriano v. Young* (1833), 6 Carr. & Payne, 8.

Where a tenant has covenanted to repair, and the premises are burnt down, he is liable to rebuild them. *Bullock v. Dommitt* (1796), 6 T. R. 650, 3 R. R. 300; *Pym v. Blackburn* (1796), 3 Ves. 34. Where there is a covenant to repair and also a covenant to insure the demised property for a specific sum, the liability of the tenant is not measured by the amount fixed for the insurance. *Digby v. Atkinson*, *supra*.

A Court of Equity will interpose to stay an act of waste on the part of a tenant from year to year. *Kimpton v. Eve* (1813), 2 Ves. & Bea. 349, 13 R. R. 116. But the Court will not grant an injunction to stay what is known as meliorating waste. *Jones v. Chapple* (1875),

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L. R., 20 Eq. 539, 44 L. J. Ch. 658; *Doherty v. Allman* (H. L. 1878), 3 App. Cas. 709, 39 L. T. 129, 26 W. R. 513; *Re McIntosh & Pontypriidd, &c. Co.* (1892), 61 L. J. Q. B. 164; *Mear v. Cobley* (1892), 1892, 2 Ch. 253, 61 L. J. Ch. 449, 66 L. T. 86.

In *Jones v. Chapple, supra*, the passage from Co. Litt. 53*a* was cited: "If a tenant build a new house that is waste," upon which the MASTER OF THE ROLLS (SIR G. JESSEL) interposed: "That is not the law at the present time. In Williams's note on Saunders (Vol. II. p. 652), it is said; 'It is a question whether it is waste to build a new house.' In *Lord Darcy v. Ashworth* (Hob. 234, ed. 1724), the law is thus stated: 'A lessee may build a new house where none was before,' and thus in *Doe v. Earl of Burlington* (5 B. & Ad. 507, 517); 'Upon the whole, there is no authority for saying that any act can be waste which is not injurious to the inheritance, either, first, by diminishing the value of the estate, or secondly, by increasing the burden upon it, or thirdly, by impairing the evidence of title, and the law is distinctly laid down by Chief Justice RICHARDSON in *Barret v. Barret* (Hetley, 35).'" Where a tenant has committed an act of waste, and the jury award nominal damages, the tenant is entitled to judgment. *Harrow School v. Alderton* (1800), 2 Bos. & P. 86, 5 R. R. 546.

In the judgments in *Doherty v. Allman, supra*, the Law Lords were at pains to distinguish those cases in which an injunction has been granted to restrain the breach of a negative stipulation. The law on the subject is summed up by the LORD CHANCELLOR (EARL CAIRNS) thus: "My Lords, if there had been a negative covenant, I apprehend, according to well settled practice, a Court of Equity would have no discretion to exercise. If parties for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done, and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury,—it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves." Where the Court, from the terms of an affirmative covenant, construes the covenant as containing an undertaking not to do anything else but what is affirmatively stated, the covenant will be construed as if it contained a negative stipulation. *Kehoe v. Marquis of Lansdowne* (H. L. 1893), 1893, A. C. 451, 62 L. J. P. C. 97.

The liability of a tenant for years, as distinguished from a tenant from year to year, depends upon *Yellowby v. Gower* (1855), 11 Ex.

294, 24 L. J. Ex. 289. The law is thus stated by PARKE, B.: "A doubt has been stated, indeed, in a note to 2 Saunders, 252, *b*, whether a tenant for years is liable to permissive waste, and if he were not, then a covenant by the landlord to repair could not amount to an implied permission to the tenant to omit to repair. These doubts arise from three cases in the Common Pleas: *Gibson v. Wells* (No. 4, p. 460, *ante*); *Herne v. Bembow* (4 Taunt. 764), and *Jones v. Hill* (7 Taunt. 392, 2 Moore, 100, 18 R. R. 508). Upon examining these cases, none of which appear to be well reported, the Court seems to have contemplated the case only of a tenant at will, in the two first cases; and in the last no such proposition is stated, that a tenant for years is not liable for permissive waste. We conceive that there is no doubt of the liability of tenants for terms of years; for they are clearly put on the same footing as tenants for life, both as to voluntary and permissive waste, by Lord COKE, in 1 Inst. 53, and *Harnet v. Maitland* (16 M. & W. 257, 16 L. J. Ex. 134), though the liability to repair by a tenant from year to year is by modern decisions much limited. See Smith's Lectures on Landlord and Tenant, p. 195."

The view that a legal tenant for life is liable for permissive waste was rejected by KAY, J., in *Re Cartwright, Avis v. Newman* (1889), 41 Ch. D. 532, 58 L. J. Ch. 590. After referring to many authorities on the subject his Lordship said: "Since the Statutes of Marlbridge and of Gloucester, there must have been hundreds of thousands of tenants for life who have died leaving their estate in a condition of great dilapidation. Not once, so far as legal records go, have damages been recovered against the estate of the tenant for life on that ground. To ask me in that state of the authorities to hold that a tenant for life is liable for permissive waste to a remainderman is altogether startling. I should not think of coming to such a decision without direct authority upon the point. Such authority as there is seems to me to be against the contention, and in opposition to the positive decisions in *Gibson v. Wells*, *Herne v. Bembow*, and *Jones v. Hill*, there are only to be found the *dicta* of Baron PARKE and the late Lord Justice LUSH, which seem to amount to this, that the words of the Statutes of Marlbridge and of Gloucester are sufficient to include the case of permissive waste, at any rate where there is an obligation on the person who has the particular estate not to permit waste, whether that obligation does or does not exist at the common law in the case of a tenant for life."

In *Jones v. Hill* (1817), 7 Taunt. 392, 2 Moore, 100, 18 R. R. 508, the lessee had covenanted from time to time and at all times during the term, when need should require, to sufficiently repair the premises, with all necessary reparations, and to yield up the same so well

repaired at the end of the term in as good a condition as the same should be in when finished under the direction of J. M. (reasonable use and wear excepted). An action on the case was brought, stating as the ground of action that the defendant, who was assignee of the term, suffered the premises to become and be in decay and ruinous during a large part of the term, and after the term yielded them up in a much worse order and condition than when the same were finished under the direction of J. M. The plaintiff was nonsuited at the trial, on the ground that an action on the case would not lie for permissive waste, and a rule to set aside the nonsuit was refused. The only judgment given is that of Sir V. GIBBS, Ch. J., who said that, whether an action on the case for permissive waste would lie or not, it could not be waste to omit to put the premises in such repair as A. B. had put them into; and waste would only lie for that which would be waste, if there were no stipulation respecting it. The modern cases treat the decision as resting on covenant, for the defendant in *Jones v. Hill* was bound as an assignee, and would have been so bound if assignus had not been named. *Martyn v. Clue* (1852), 18 Q. B. 661, 22 L. J. Q. B. 147; *Minshull v. Oakes* (1858), 2 H. & N. 793, 27 L. J. Ex. 194; *Williams v. Earle* (1868), L. R., 3 Q. B. 739, 37, L. J. Q. B. 231, 9 B. & S. 740. In the case of *White v. Nicholson* (1842), 4 Scott N. R. 264, 11 L. J. Ch. 264, the landlord covenanted to take the fixtures at the end of the tenancy, "provided they are in the same condition as they now are," and the defendant agreed "to leave the premises in the same state as they now are." The demise did not contain any exception as in *Jones v. Hill, supra*. The word "now" was construed as referring to the commencement of the tenancy, and a breach "that the defendant did not leave the premises in the same state as at the commencement of the tenancy," was held to be properly assigned. In *Scales v. Lawrence* (1860), 2 Fost. & Finl. 289, which is a *nisi prius* decision, there was an exception of reasonable wear and tear. It was held that if the tenant had repaired within a reasonable time before leaving, he would only be bound, in addition to the repair of actual dilapidations, to clean old paint but not to repaint.

The liability of a tenant from year to year for repairs, apart from contract, rests on the principal case, and the decision of Lord KENYON in the case there cited (p. 464, *supra*), which is variously cited as *Ferguson v. Nightingale*, or *Ferguson v. Black* (1797), 2 Esp. 590, 5 R. R. 757, and other *nisi prius* decisions. The obligation has been stated as one to keep the property wind and water tight. *Anworth v. Johnson* (1832), 5 C. & P. 239; *Torriano v. Young* (1833), 6 C. & P. 8; *Leach v. Thomas* (1835), 7 C. & P. 327. There is nothing inconsistent with a tenancy from year to year that the tenant should under-

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take by express agreement to do repairs of a substantial character. *Richardson v. Gifford* (1834), 1 Ad. & Ell. 52; *Beale v. Sanders* (1837), 3 Bing. N. C. 850, 5 Scott, 58, 3 Hodges, 147, 1 Jur. 1083.

The remedy for an act of waste is not merged in a covenant to repair. *Kinlyside v. Thoruton* (1776), 2 W. Bl. 111.

There are two classes of cases upon covenants to repair, namely, those in which the obligation to repair arises only after notice to repair has been given, and those in which there are two covenants, one to repair generally, and one to repair after notice. As examples of the first class may be cited *Horsefall v. Testar* (1817), 7 Taunt. 385, 1 Moore, 89; and of the second class, *Baylis v. Le Gros* (1858), 4 C. B. (N. S.) 537, 4 Jur. (N. S.) 513; *Few v. Perkins* (1867), L. R., 2 Ex. 92, 36 L. J. Ex. 54, 16 L. T. 62, 15 W. R. 713. Where an underlessee has covenanted to repair after notice, the notice to be effectual must in general be served by his immediate landlord, and a notice served by the superior landlord will not be sufficient. *Williams v. Williams* (1874), L. R., 9 C. P. 659, 43 L. J. C. P. 382, 30 L. T. 638, 22 W. R. 716.

So too where the landlord has covenanted to put the premises into repair, the performance of his covenant may be a condition precedent to the liability of tenant under a covenant to maintain in repair. *Coward v. Gregory* (1866), L. R., 2 C. P. 153, 36 L. J. C. P. 1, 12 Jur. (N. S.) 1000, 15 L. T. 279, 15 W. R. 170.

A covenant to repair and to leave in repair are generally treated as independent covenants, and the landlord may maintain an action for want of repair before the expiration of the term. *Luxmore v. Robson* (1818), 1 B. & Ald. 584, 19 R. R. 396. The cases relating to the measure of damage, and the considerations affecting the amount, will be found under the next rule.

The assignee of the reversion cannot sue under 32 Hen. VIII. c. 34, unless the assignment is by deed. *Standen v. Christmas* (1847), 10 Q. B. 135, 16 L. J. Q. B. 265, 11 Jur. 694. Where the demise was by a document not under seal the original lessor was the proper person to sue after assignment. *Bickford v. Parson* (1848), 5 C. B. 921, 17 L. J. C. P. 193, 12 Jur. 377. The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) s. 10, has extended the provisions of the 32 Hen. VIII. c. 34 to leases by parol. The Act of Henry VIII. enabled the assignee of the reversion of part of the demised property to maintain covenant against the lessee for not repairing. *Twyman v. Pickard* (1818), 2 B. & Ald. 105, 20 R. R. 368. The lessee continues after assignment to be liable on his covenant. *Russell v. Stokes* (Ex. Ch. 1791), 1 H. Bl. 562, 3 T. R. 678, 1 R. R. 732; *Auriol v. Mills* (1790), 4 T. R. 94, 2 R. R. 341.

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Where there is a breach of covenant the executor may maintain an action without showing that the personal estate of the testator has suffered damage. *Raymond v. Fitch* (1835), 2 Cr. M. & R. 588, 5 Tyrw. 985, 5 L. J. Ex. 45; *Ricketts v. Weaver* (1844), 12 M. & W. 718, 13 L. J. Ex. 195. Where however the covenants run with the land, and descend to the heir, though there may be a formal breach in the ancestor's lifetime, yet if the substantial damage has taken place since his death, the real representative, and not the personal, is the proper plaintiff. *Per PARKE, B.*, in *Raymond v. Fitch*, *supra*, citing *Kingdon v. Nottle* (1813), 1 M. & S. 355, 14 R. R. 462; *King v. Jones* (1814), 5 Taunt. 418, 15 R. R. 533.

Before the landlord can enforce a proviso for re-entry on breach of a covenant to repair he must now give notice under the Conveyancing and Law of Property Act, 1881 (14 & 45 Vict. c. 41), s. 14. The section does not apply in the case of a tenant who has taken possession under an agreement to grant a lease for 21 years but has paid no rent, as the agreement under these circumstances creates merely a tenancy at will. *Cotesworth v. Johnson* (C. A. 1886), 55 L. J. Q. B. 220, 54 L. T. 52. Where the tenant under an agreement has paid rent, but has no title to have an agreement for a lease specifically performed by the execution of a lease, he is not entitled to a notice under the section. *Savin v. Ayers* (C. A. 1888), 21 Q. B. D. 289, 57 L. J. Q. B. 424, 36 W. R. 798. The notice must specify the particular breach complained of, and, if the breach is capable of remedy, require the lessee to remedy the breach, and, in any case, require the lessee to make compensation in money for the breach. Conveyancing and Law of Property Act, 1881, s. 14 (1). Notwithstanding the words of the subsection, "and, in any case, requiring the lessee to make compensation in money for the breach," it has been held that the words are directory merely, and that a notice by which compensation is not claimed is a good notice under the Act. *Lock v. Pearce* (C. A. 1893), 1893, 2 Ch. 271, 62 L. J. Ch. 582, 68 L. T. 569, 11 W. R. 369. The compensation mentioned in the section was measured by the same rules as damages in an action for the breach. *Skinner's Co. v. Knight* (C. A. 1891), 1891, 2 Q. B. 542, 60 L. J. Q. B. 629, 65 L. T. 240, 40 W. R. 57. Now by the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), s. 2 (1), where the lessor at the request of the lessee waives the breach by writing under his hand, or if the lessee is relieved under the provisions of the Acts of 1881, or 1892, the lessor is entitled to recover as a debt due to him from the lessee, and in addition to the damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor, or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture.

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This subsection, which was designed to override the decision in the *Skinnors Co. v. Knight*, *supra*, has failed in practice to attain that object. It frequently happens that the lessee has complied within a reasonable time with the terms of the notice to repair the breach of covenant, and where he has done this he is not "relieved" from a forfeiture. *Nind v. Nineteenth Century Building Society* (C. A. 1894), 1894, 2 Q. B. 226, 63 L. J. Q. B. 636, 70 L. T. 831, 42 W. R. 481. Having complied with the notice the right of action becomes unenforceable, and if the tenant is only wise enough, and he generally is, not to request the lessor to waive the breach by writing, the landlord is saddled with the expense of employing a solicitor, and surveyor, although the expense is incurred by reason of the tenant's own default.

Sub-section 2 of section 14 of the Act of 1881, to which a passing reference has been made, is as follows: "Where a lessor is proceeding by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit." Where the lessee applies in an independent action the proceedings must be commenced by Writ. *Loch v. Pearce* (C. A. 1893), 1893, 2 Ch. 271, 62 L. J. Ch. 582, 68 L. T. 569, 41 W. R. 369. Where the benefit of this section is invoked by the tenant the Court may award, as part of the damages recoverable by the landlord, costs as between solicitor and client, and fees paid for surveys and schedule of dilapidations. *Bridge v. Quick* (1892), 61 L. J. Q. B. 375, 67 L. T. 54.

The provisions of the Act of 1881 did not apply as between the superior landlord and an under-tenant. *Burt v. Gray* (1891), 1891, 2 Q. B. 98, 60 L. J. Q. B. 604, 65 L. T. 229, 39 W. R. 429. This is remedied by the Act of 1892, s. 4: "Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the Court may, on application by any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease or any less term the property comprised in the lease or any

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part thereof, in any person entitled as underlessee to any estate or interest in such property upon such conditions as to the execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security or otherwise, as the Court in the circumstances of each case shall think fit, but in no case shall any underlessee be entitled to require a lease to be granted to him for any longer term than he had under his original sublease." Where the underlessee intervenes in the lessor's action he may claim the relief by defence and counter-claim. *Cholmley School Highgate v. Sewell* (1893), 1893, 2 Q. B. 254, 62 L. J. Q. B. 476, 69 L. T. 118, 41 W. R. 637. At the trial of the same case the defendant underlessee was required to execute a counter-part lease, in effect substituting himself for the original lessee, and covenanting to perform the obligations which the original lessee had undertaken. s. c. (1894), 1894, 2 Q. B. 906, 63 L. J. Q. B. 820, 71 L. T. 88.

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The principal case is cited in Mr. Washburn's important work on Real Property (vol. 1, p. 537), to the statement: "But neither the lessor, nor the lessee, if he uses the premises in a husbandlike manner, will be bound to rebuild or repair the premises, if destroyed or damaged without his fault, in the absence of an express covenant to that effect in the lease."

Tiedeman on Real Property (sect. 79), says: "Tenants for life or for years are required to make all the repairs necessary to keep the premises in as good condition as they were when they entered into possession. . . . He will not however be forced to expend any very large sums of money, where there has been any extraordinary decay or destruction of the buildings."

"A tenant must use ordinary care to prevent buildings going to decay." Boone on Real Property, sect. 115.

"It is true that a tenant for life is required to keep the buildings in which he may have a life estate from going to decay, by using ordinary care; but he is not required to expend any extraordinary sums." *Wilson v. Edmunds*, 21 New Hampshire, 515, citing 1 Kent Com., 76.

"A tenant is bound to commit no waste, and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premises; but not to make substantial and lasting repairs, such as to put on new roofing (2 Esp. N. P. 590). He is not liable for general repairs. *Horsefall v. Mather* (Holt's N. P. C. 7); nor is he compellable to restore premises if burned down or become ruinous by any other accident, without any default on his part." *Long v. Fitzimmons*, 1 Watts & Sergeant (Penn.), 530; cited and approved, *Libbey v. Telford*, 18 Maine, 316; 77 Am. Dec. 229. "A tenant for life" will be required to make no other repairs than such as are necessary to prevent waste." *Kearney v. Est. of Kearney*, 17 New Jersey Equity, 504. The tenant is not bound to repair dilapidations existing when he comes into possession. *Clemence v.*

No. 5. — *Horsefall v. Mather.* — Notes.

Steele, 1 Rhode Island, 272. Lessee is under obligation to use premises in proper and tenantable manner, and not to expose buildings to ruin or waste by acts of omission or commission. *Powell v. Dayton, &c. R. Co.*, 16 Oregon, 33; 8 Am. St. Rep. 251: "This implied obligation . . . is not a covenant to repair generally, but to so use the property as to avoid the necessity for repairs as far as possible." Citing the principal case. *Brown v. Crump*, 1 Marshall, 569; *United States v. Bostwick*, 94 United States, 56.

In *Syglum v. Jackson*, 54 New York, 450, the Court said: "But the lessee was under an implied covenant to his landlord to make what are called 'tenantable repairs.'" (Citing Comyn: "He is bound therefore to keep the soil in a proper state of cultivation, to preserve the timber, and to support and repair the buildings. These duties fall upon him without any express covenant on his part, and a breach of them will in general render him liable to be punished for waste.") "The lessee was not bound to make substantial, general, or lasting repairs, but only such ordinary repairs as were necessary to prevent waste and decay of the premises. If a window in a dwelling should blow in, the tenant could not permit it to remain out and the storms to beat in and greatly injure the premises without liability for permissive waste; and if a shingle or board on the roof should blow off or become out of repair, the tenant could not permit the water, in time of rain, to flood the premises, and thus injure them, without a similar liability. He being present, a slight effort and expense on his part could save a great loss; and hence the law justly casts the burden upon him." To the same effect, *Hughes v. Fanstone*, 24 Missouri Appeals, 637.

The tenant is liable for unreasonably overloading a barn, causing it to fall. *Chalmers v. Smith*, 152 Massachusetts, 561; 11 Lawyers' Rep. Annotated, 769.

The tenant may cut timber for firewood and for repairs of buildings, but may not cut ornamental timber. *Cuivert v. Rice*, 91 Kentucky, 533; 34 Am. St. Rep. 240, and note, 242.

In the absence of an express covenant, the tenant is not liable for the destruction of buildings by fire without his fault. Tiedeman on Real Property, sect. 79; *United States v. Bostwick*, 94 United States, 56, citing the principal case: "It has never been so construed as to make a tenant answerable for accidental damages, or to bind him to rebuild if the buildings are burned down or otherwise destroyed by accident." (By Chief Justice WAITE.) *Warren v. Wagner*, 75 Alabama, 188.

A tenant in dower may delay a reasonable time in making repairs, provided no injury ensues, in order to get materials cheaper. *Harvey v. Harvey*, 41 Vermont, 373.

No. 6. — *Gutteridge v. Munyard*, 1 Moo. & Rob. 384. — Rule.

No. 6. — GUTTERIDGE *v.* MUNYARD.

(N. P. 1834.)

No. 7. — BURDETT *v.* WITHERS.

(K. B. 1837.)

No. 8. — LISTER *v.* LANE AND NESHAM.

(C. A. 1893.)

RULE.

IN ascertaining the liability of a tenant who has agreed or covenanted to keep in repair, or to keep and leave in repair, the demised property, its age and class and general condition, but not particular defects or want of repair, at the time the term commenced, must be taken into consideration.

Gutteridge v. Munyard.

1 Moody & Robinson 334-337 (s. c. 7 Carr. & Payne, 129).

Covenant to Repair. — Extent of Liability.

[334] Where a lessee covenants to keep old premises in repair, he is not liable for such dilapidations as result from the natural operation of time and the elements.

This was an issue from the Court of Chancery.

John Stayley, by a lease dated 16th November, 1808, demised a house and premises called the Chicken House estate, situate at Hampstead, to James Daniell, his executors, &c., for the term of twenty-one years, at the yearly rent of £50. The lessee covenanted, "that he, his executors, administrators, or assigns should, and would from time to time, and at all times during, &c., at his and their own proper costs and charges, well and sufficiently repair, uphold, support, maintain, glaze and amend, and keep the said messuage or tenement, and other the buildings, and the windows and sashes, tilings, &c., and all other the appurtenances thereby demised, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever. And should and would at the end or other sooner determination of the

No. 6. — *Gutteridge v. Munyard*, 1 Moo. & Rob. 334-336.

said demise, leave, surrender, and yield up unto the said John Stayley, his heirs and assigns, the said messuage or tenement, and all and singular other the premises, with the appurtenances thereby demised, so well *and sufficiently re- [* 335] paired, upheld, supported, maintained, glazed, &c., and kept as aforesaid, and all new erections, buildings, and improvements that should or might be made in or upon the said premises in the mean time (reasonable use and wear thereof in the meantime only excepted).” Proviso for re-entry on breach of covenants.

The plaintiffs represented John Stayley, the lessor above named, and the defendants were the executors of Daniell, the lessee; but the premises were in the occupation of under-lessees.

The plaintiffs having brought ejectments against the tenants in possession, on the ground that the interest of the lessee had become forfeited by breaches of the covenant, the defendants filed a bill in the Court of Chancery against the plaintiffs for an injunction: whereupon the LORD CHANCELLOR directed the following issue to be tried:—

1st, Whether the said James Daniell, his executors, &c., did from time to time, &c., well and sufficiently repair, &c. (following the words of the covenant), according to the true intent and meaning of the said indenture?

There were three other issues, which it is not necessary to notice.

As to the breach of the covenant to repair, it was proved that the Chicken House was a very old building, of the age of between two and three centuries at the least, and it was described as being now in a very dilapidated state; the walls with cracks in them, and out of the perpendicular; the floors sunk; many of the timbers rotten; the tilings and woodwork of the sashes broken, &c. The tenant had painted the inside at the time of the cholera, two or three years before the trial; but *it did not [* 336] appear that much else had ever been done to it. It did not appear that the defendants had ever been required to perform the covenants before the commencement of these proceedings.

The defendants called no witnesses; but Wilde, Serjt., contended that no such substantial breach of covenant had been proved by the plaintiffs as could create a forfeiture; and he cited *Harris v. Jones*, 1 Moo. & Rob. 173.

TINDAL, C. J., in commenting on the evidence to the jury, said, Where a very old building is demised, and the lessee enters into

No. 7. — *Burdett v. Withers*, 7 Adol. & El. 136.

a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss, which, so far as it results from time and nature, falls upon the landlord. But the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect: he is bound by seasonable applications of labour to keep the house as nearly as possible in the same condition as when it was demised. If it appears that he has made these applications, and laid out money from time to time upon the premises, it would not perhaps be fair to judge him very rigorously by the reports of a surveyor, who is sent upon the premises for the very purpose of finding fault. Still there is only a certain latitude to be allowed in these cases; and the jury are to say whether or not the lessees [* 337] * have, in the present instance, done what was reasonably to be expected of them, looking to the age of the premises, on the one hand, and to the words of the covenant which they have chosen to enter into, on the other.

The jury said, that, under all the circumstances, they thought the covenants had not been broken; and they found a

Verdict for the defendants.

Talfourd, Serjt., and Butt for the plaintiffs.

Wilde, Serjt., Thesiger, and Hoggins for the defendants.

A motion was afterwards made before the LORD CHANCELLOR to set aside the verdict, on the ground that it was against the evidence; but no objection was made to the manner in which the LORD CHIEF JUSTICE had left the case to the jury.

Burdett v. Withers.

7 Adolphus & Ellis, 136-138 (s. c. 2 N. & P. 122; W. W. & D. 444; 1 Jur. 514).

Agreement to Repair. — Extent of Liability.

[136] Assumpsit on a promise, by a tenant, to keep premises in good and sufficient repair: and breach by not so keeping. Plea, payment of £5 into Court, and no further damage.

On an issue taken upon such plea, the defendant is entitled to prove at the trial what the state of the premises was at the time of the demise.

No. 7. — *Burdett v. Withers*, 7 Adol. & El. 136-138.

Assumpsit. The declaration stated that heretofore, to wit, 29th September, 1827, defendant became tenant to plaintiff of certain farms, upon the terms, among others, that defendant should, during the tenancy, keep all the premises in good and sufficient repair at his own expense; and, in consideration thereof, defendant promised plaintiff that he would, during the continuance of the tenancy, keep all the premises, &c. (as before): that defendant became tenant, &c. : *breach, that he did not [*137] keep, &c., and at the end of the term yielded the premises up in bad repair. Plea, that the plaintiff ought not further, &c., because the defendant brings into court £5, and plaintiff has not sustained damages to a greater amount. Replication, that the plaintiff has sustained damages to a greater amount. Issue thereon. On the trial before ALDERSON, B., at the Berkshire Spring assizes, 1836, the plaintiff produced evidence to show the bad state of the premises at the time of the defendant's quitting. The defendant's counsel cross-examined as to the state of the premises at the time of the defendant's coming into possession: but the learned Judge, being of opinion that this was not relevant to the issue, stopped the cross-examination, and refused to admit evidence for the defendant on this point; and he said, in his charge to the jury, that they must estimate the damages on this issue at the sum which it would cost to put the premises into tenantable repair, without reference to the state in which the defendant found them. Verdict for the plaintiff; damages £162 10s. In Easter term, 1836, Cooper obtained a rule *nisi* for a new trial, citing *Harris v. Jones*, 1 M. & Rob. 173, and *Gutteridge v. Munyard*, 1 M. & Rob. 334 (p. 474, *ante*).

Ludlow, Serjt., now showed cause. By the form of the issue the liability is admitted; so that, if the damages exceed £5 by any sum, the Court can only reduce the damages. The cases cited on moving for the rule were discussed in *Stanley v. Tourgood*, 3 Bing. N. C. 4, where, in an action on a covenant to keep and leave in good *and tenantable repair, it was held [*138] that, although a jury should be allowed to take into consideration whether the house was new or old, the state of repair at the time of the demise was not to be considered. Here the tenant purchased his term by agreeing to keep in good repair: after that, he is not to be allowed to show that the state of the premises was bad, he having made his contract.

Cooper, *contra*, was stopped by the Court.

LORD DENMAN, C. J. The verdict might have been for the defendant if the evidence had been submitted to the jury. It is very material, with a view both to the event of the suit and to the amount of damages, to show what the previous state of the premises was. We cannot reduce the damages; for we have no means of forming an estimate.

LITLEDALE, PATTESON, and WILLIAMS, JJ., concurred.

Rule absolute.

Lister v. Lane & Nesham.

1893, 2 Q. B. 212-218 (s. c. 62 L. J. Q. B. 583; 69 L. T. 174; 41 W. R. 626).

Covenant to Keep and Leave in Repair. — Inherent Defect in Premises.

[212] The plaintiffs granted to the defendants a lease of a house in Lambeth, containing a covenant by the lessees that they would "when and where and as often as occasion shall require, well, sufficiently, and substantially, repair, uphold, sustain, maintain, amend, and keep" the demised premises, and the same "so well and substantially repaired, upheld, sustained, maintained, amended, and kept," at the end of the term yield up to the lessors. Before the end of the term one of the walls of the house was bulging out, and after the end of the term the house was condemned by the district surveyor as a dangerous structure and was pulled down. The plaintiffs sought to recover from the defendants the cost of rebuilding the house. The evidence showed that the foundation of the house was a timber platform, which rested on a boggy or muddy soil. The bulging of the wall was caused by the rotting of the timber. The house was at least 100 years old, and possibly much older. The solid gravel was seventeen feet below the surface of the mud. There was evidence that the wall might have been repaired during the term by means of underpinning:—

Held, that the defect having been caused by the natural operation of time and the elements upon a house the original construction of which was faulty, the defendants were not under their covenant liable to make it good.

Appeal by the plaintiffs against the judgment of GRANTHAM J., at the trial of the action, for the defendant Nesham.

The action was by lessors against their lessees, the defendants Lane & Nesham, to recover damages for alleged breach of a covenant contained in the lease to repair the demised premises. The defendant Lane died after he had delivered a defence, and the action proceeded against the defendant Nesham alone.

The lease was dated November 22, 1883, and by it the plaintiffs demised to the defendants Lane & Nesham a wharf at Lambeth,

known as the Shot Tower Wharf, and also the building known as the Shot Tower and a warehouse, and also a messuage (called the Cottage), stables, sheds, &c., adjoining, to hold unto Lane & Nesham, their executors, administrators, and assigns, for the term of seven years from September 29, 1883, at the yearly rent of £800. There was a joint and several covenant by the lessees with lessors, that the lessees would at their own costs and charges * “when and where, and as often as occasion shall [* 213] require, well, sufficiently, and substantially repair, uphold, sustain, maintain, glaze, pave, . . . amend, and keep all and singular the said wharf, Shot Tower, warehouse, messuage, buildings, and premises, . . . and all the walls, pavements, &c., to the said premises belonging or in anywise appertaining, . . . and the said wharf, Shot Tower, warehouse, messuage, buildings, and premises, . . . so well and substantially repaired, upheld, supported, sustained, maintained, glazed, . . . amended, and kept, at the end or other sooner determination of the said term hereby granted, will peaceably and quietly leave, surrender, and yield up” unto the lessors in such good and substantial state and condition as the lessors “may be bound to deliver up the same premises to the superior landlord or landlords thereof at the expiration of the lease under which they now hold the premises.”

The defendants entered into possession of the demised premises under this lease, and they remained in possession until the end of the term in September, 1890. In August, 1890, the plaintiffs delivered to the defendants a notice, signed by the plaintiff's surveyor, to execute certain repairs to the premises according to particulars delivered with the notice. The plaintiffs by their statement of claim alleged that “the defendants did not, pursuant to the said notice, do the said repairs. In consequence of the said breaches of covenant by the defendants part of the said demised buildings became dangerous and had to be pulled down, and the plaintiffs suffered great loss and damage to their reversion.”

The plaintiffs claimed £700, the principal item in which was a sum of £569, for “rebuilding dwelling-house,” meaning the Cottage.

The defendant Nesham by his defence said that the notice to repair “required work to be done which the defendant was not bound to do by the terms of the covenant to repair in the said lease contained. The premises were repaired and were delivered

up in repair in accordance with the said covenant. After the determination of the said lease part of the demised buildings were pulled down, but not by order of the defendants, nor in consequence of their act or default."

[* 214] *At the trial Mr. Douglas, the plaintiff's surveyor, was examined. He said that in 1887 the premises were in bad condition. He called the attention of the defendant Nesham to the want of repair. In August, 1890, he again inspected the premises. The south wall of the Cottage was bulged, and the floors were five inches out of level. The witness prepared the notice which was served in August, 1890. The repairs were commenced, and all was done but the wall. He said that the wall could have been rebuilt without any difficulty in 1887, and if the pointing of the wall had been done and the wall had been underpinned, no difficulty would have arisen. The wall had pitched more towards the east in 1890. In August, 1890, he gave notice to pull down or repair the wall. It might be that it would have involved the pulling down of the house. He estimated the cost of putting right the Cottage at £513. From what he had seen since he did not believe it was possible to have pulled down the wall without pulling down the house.

Mr. Truscott, a builder, stated that he was employed by the defendants to do work to the premises, and from 1889 to June, 1891, he was continuously doing something. He put up scaffolding to point the wall in September, 1891, intending to pull down part of the wall and rebuild. He gave notice to the district surveyor, who examined the house and condemned it as a dangerous structure. "In the foundations of the building I found a mud cill. It was used instead of concrete foundation, and it had rotted. I think it would cost £530 to put the Cottage back." A "mud cill" was explained as meaning a timber platform, which rested on a boggy soil and on which the Cottage was built. In cross-examination the witness said: "The Cottage was a very old building, indeed, at least 100 years. I cannot say if it was 200 years old. No one knew of the foundation. It could have been underpinned." Mr. Hewitt, the district surveyor, deposed that in November, 1891, the Cottage was in a dangerous condition. He came to the conclusion that it was a bad foundation. "I think it had been falling over ever since it was built. I think the cause of bulging was the sinking of the foundation. I think the decay

would be gradual, and it would get worse from 1890 to 1891. I *do not think it would have been profitable to [* 215] repair it without pulling it down. The soil is very boggy, and the gravel is seventeen feet down."

T. Terrell, for the plaintiffs. There was a breach of the defendants' covenant to repair during the lease and at the end of it. The defendants might have underpinned the wall; but the learned Judge at the trial held that that would have cost so much that it did not reasonably come within the covenant. No doubt the authorities show that such a covenant must be construed with regard to the nature and the age of the demised premises. But here the covenant is not only to "repair," but also to "uphold, maintain, and keep" the premises. Under a general covenant to repair the tenant is bound to rebuild a house if it is accidentally destroyed by fire. *Bullock v. Dommitt*, 6 T. R. 650 (3 R. R. 300).

The principles applicable to the construction of repairing covenants are shown by *Payne v. Huine*, 16 M. & W. 541, 16 L. J. Ex. 130; *Easton v. Pratt*, 2 H. & C. 676; *Proudfoot v. Hart*, 25 Q. B. D. 42; *Gutteridge v. Munyard*, 7 C. & P. 129; 1 Mood. & Rob. 334 (p. 474, *ante*).

[BOWEN, L. J., referred to *Soward v. Leggatt*, 7 C. & P. 613.]

McCall, Q. C., and Stewart-Smith, for the defendant Nesham, were not heard.

LORD ESHER, M. R. In deciding this case we have to consider by what rules we ought to govern our inquiry. In Smith's Law of Landlord and Tenant, 3d ed. at p. 302, I think that the result of the cases is properly stated. I do not cite that work as an authority, but only as stating correctly the rule to be deduced from the cases. The learned author says, referring to *Gutteridge v. Munyard* and other cases: "These cases establish that, where there is a general covenant to repair, the age and general condition of the house at the commencement of the tenancy are to be taken into consideration in considering whether the covenant has been broken; and that a tenant who enters upon an old house is not bound to leave it in the same *state as if it [* 216] were a new one." You have to consider not only what the damage is — what is the amount of repair required — but also whether the covenant has been broken. That I take to be the right rule, and it is derived partly from the summing-up of TINDAL, C. J., in *Gutteridge v. Munyard*, 1 Mood. & Rob. 334;

7 C. & P. 129 (p. 474, *ante*), which is always cited on this point. The learned Chief Justice said, 1 Mood. & Rob. at p. 336 (p. 475, *ante*): "Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term or of greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss which, so far as it results from time and nature, falls upon the landlord."

You have then to look at the condition of the house at the time of the demise, and, amongst other things, the nature of the house, — what kind of a house it is. If it is a timber house, the lessee is not bound to repair it by making a brick or a stone house. If it is a house built upon wooden piles in soft ground, the lessee is not bound to take them out and to put in concrete piles. That seems to me to be the effect of *Soward v. Leggatt*, 7 C. & P. 613, in which Lord ABINGER, C. B., said (at p. 617): "The surveyor who has been called on the part of the plaintiff, has given you an estimate; but it is also proved that, when the repairs came to be done, they amounted to considerably more than the estimate. and that is generally the case, because, when the work is actually done, improvements are made for which the tenant is not liable, of which the improved mode of laying the joists in the kitchen is an example, and if the joists have been now laid in a manner which will make them more durable and last longer before new ones are again wanted, that is a thing for which the tenant is not liable on the covenant to repair."

Those cases seem to me to show that, if a tenant takes a house which is of such a kind that by its own inherent nature it will in course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair.

[* 217] However * large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant. He has to repair that thing which he took; he is not obliged to make a new and different thing; and, moreover, the result of the nature and condition of the house itself, the result of time upon that state of things, is not a breach of the covenant to repair.

What is the evidence in the present case? The house is an old house built in Lambeth. Lambeth, as we know, was formerly at every unusually high spring tide under water. Therefore, the soil on which this house was built was saturated with water and turned into mud. The high tides in the Thames — that is, the natural elements — made that soil from time to time a boggy and muddy soil, and a shifting soil, for the moment it becomes liquid it shifts like a moss. How did people build at that time upon that muddy soil? They did not go down to the gravel below, but they placed a platform of timber, which, as it were, floated on the muddy soil, in the same way as when the railway went through Chatmoss, the engineer put into the moss as many fagots as possible, and then built the railway on them. So here the builder placed a platform of timber on this muddy soil, and built the house upon it. That is the nature of this house. Whatever happens by natural causes to such a house in course of time — the effects of natural causes upon such a house in the course of time — are “results from time and nature which fall upon the landlord,” and they are not a breach of the covenant to repair. They are matters which must be taken into account in considering whether the covenant to repair has been broken, and, when they are the results of time and nature operating on such a house, they are not a breach of the covenant, and the tenant is not bound to do anything with regard to them. That, as it seems to me, is the state of things in this case, and therefore the decision of GRANTHAM, J., was quite right. The tenant from time to time did the proper repairs, and now the plaintiffs want him to do something for which he is not liable, and which would be of no avail unless he built a house of an entirely different kind.

BOWEN, L. J., I agree.

*KAY, L. J. I am of the same opinion. I will add a [*218] few words with regard to the law. In construing such a covenant, regard must be had to the character and condition of the demised property, and, assuming that this covenant is, as has been argued, expressed in the largest terms, that it is a covenant to keep in repair and to put in repair, still *Payne v. Haine*, 16 M. & W. 541, 16 L. J. Ex. 130, shows that regard must be had to the character of the house to which the covenant applies. Here the house was built upon a timber structure laid upon mud, the solid gravel being seventeen feet below the timber structure,

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and the only way in which the effect of time upon the house could be obviated is, according to the surveyor's evidence, by "underpinning" the house. That was the only way to repair it during the tenancy. "Underpinning," as I understand, means digging down through the mud until you reach the solid gravel, and then building up from that to the brickwork of the house. Would that be repairing, or upholding, or maintaining the house? To my mind, it would not; it would be making an entirely new and different house. It might be just as costly to underpin as to pull the house down and rebuild it. No one says, as I judge from the evidence, that you could repair the house by putting in a new timber foundation. The only way, as the surveyor says, to repair it is by this underpinning. That would not be either repairing, or upholding, or maintaining such a house as this was when the lessee took it, and he is not liable under his covenant for damage which accrued from such a radical defect in the original structure. The appeal must be dismissed with costs.

Appeal dismissed.

ENGLISH NOTES.

A covenant to repair runs with the land, and the assignee of a lease is bound by the terms of a covenant to repair, although the assigns are not named in the covenant. *Martyn v. Chew* (1852), 18 Q. B. 661, 22 L. J. Q. B. 147; *Minshull v. Oakes* (1858), 2 H. & N. 793, 27 L. J. Ex. 194; *Williams v. Williams* (1868), L. R., 3 Q. B. 739, 37 L. J. Q. B. 231, 9 B. & S. 740.

The original lessee continues liable on his covenant to repair, after he has assigned: "It is extremely clear, that a person who enters into an express covenant in a lease, continues liable on his covenant notwithstanding the lease be assigned over. The distinction between the actions of debt and covenant, which was taken in early times, is equally clear; if the lessee assign over the lease, and the lessor accept the assignee as his lessee, either tacitly or expressly, it appears by the authorities that an action of debt will not lie against the original lessee; but all those cases with one voice declare, that if there be an express covenant, the obligation on such covenant still continues. And this is founded not on precedents, but on reason; for when the landlord grants a lease he selects his tenant; he trusts to the skill and responsibility of that tenant; and it cannot be endured that he should afterwards be deprived of his action on the covenant to which he trusted by an act to which he cannot object, as in the case of an execution." *Per Lord KENYON, CH. J., Auriol v. Mills* (1790), 4 T. R. 94, 98, 2

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R. R. 341. In *Mills v. Guardians of East London Union* (1872), L. R., 8 C. P. 79, 42 L. J. C. P. 46, 27 L. T. 557, 21 W. R. 142, the interest of the lessees had been compulsorily acquired by a railway company. The question, in the action by the lessor against the lessee upon the covenants in a lease, was whether the state of repair should be taken at the time when the notice to treat was given, or when the assignment was executed and possession given to the railway company. The landlord was willing to accept the latter period as the proper time, and did not attempt to argue that the liability of the tenant continued after the date of the execution of the assignment. For the tenant it was argued that the time for estimating the damages was the date of the notice to treat, but this contention was rejected by the Court.

The Court has construed covenants to repair, whatever form of expression has been used, as involving practically similar obligations. Thus "good repair" and "habitable repair" have been treated as amounting to the same thing. *Cooke v. Holmondeley* (1858), 4 Drew. 326, 27 L. J. Ch. 826. "Habitable repair" has been defined to be a state of repair fit for the occupation of an inhabitant. *Belcher v. McIntosh* (1839), 8 Car. & P. 720, 2 Moo. & Rob. 186. The qualification of a covenant "to keep a house in tenantable repair" by the adjective "good" does not seem to extend materially the liability of the tenant. *Proudfoot v. Hart* (C. A. 1890), 25 Q. B. D. 42, 59 L. J. Q. B. 389, 63 L. T. 171, 38 W. R. 730. Leases sometimes contain covenants to do particular items of repairs, and specify the periods at which these matters shall be executed, *e. g.* that the tenant shall once in every seven years whitewash, paint, and paper the inside of the demised property, where the same are accustomed to be whitewashed, painted, and papered. Upon a proof of the breach of the latter covenant the plaintiff would be entitled to nominal damages. *Harris v. Jones* (1832), 2 Moo. & Rob. 173. In that case the jury notwithstanding the direction of the judge at the trial found a verdict generally for the defendant, and a rule for a new trial was discharged, on the ground that in any event the plaintiff would not have been entitled to £20 damages.

Although the landlord has covenanted to do the repairs the tenant is not entitled to give up the premises on the ground that the landlord has failed to do the repairs, although the premises are thereby made unfit for the purpose for which they were taken. *Surplice v. Furnsworth* (1844), 7 Man. & Gr. 576, 8 Scott. N. R. 307, 13 L. J. C. P. 215.

Where there is an engagement on the part of the tenant to do repairs, and an undertaking by the landlord to supply the materials, or a liberty to use materials growing or being on the land, the obligation of the tenant in general is not qualified, but he must repair, whether the landlord fulfils his obligation, or the materials exist or not. *Dean*

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& *Chapter of Bristol v. Jones* (1859), 1 Ell. & Ell. 484, 28 L. J. Q. B. 201, 5 Jur. (N. S.) 956, 7 W. R. 307; *Tucker v. Linger* (1882), 21 Ch. D. 18, 51 L. J. Ch. 713, 46 L. T. 198, 30 W. R. 425. But the landlord is liable in damages for the breach of his undertaking. *Snell v. Snell* (1825), 4 B. & C. 741, 7 Dowl. & Ry. 249.

The measure of damages for the breach of a covenant to repair, and also for the breach of a covenant to keep and leave in repair, depends upon the principles enunciated in *Hadley v. Baxendale*, No. 5 of "Carrier," 5 R. C. p. 502. Upon a breach of covenant to repair, the measure of damages is the injury to the marketable value of the reversion. *Mills v. Guardians of East London Union* (1872), L. R., 8 C. P. 79, 42 L. J. C. P. 46, 27 L. T. 557, 21 W. R. 142. A similar principle was applied where the tenant had committed a breach of the covenant, implied in law, not to commit voluntary waste. *Witham v. Kershaw* (C. A. 1885), 16 Q. B. D. 613, 54 L. T. 124, 34 W. R. 340. This rule was applied with a curious result in *Williams v. Williams* (1874), L. R., 9 C. P. 659, 43 L. J. C. P. 382, 30 L. T. 638, 22 W. R. 706. The defendant in that case had covenanted to repair generally, and also to repair after notice. The plaintiff was in fact a lessee, and to prevent the superior landlord from re-entering, gave notice to the tenant to repair, but before the notice expired entered and did the repairs. He was held not entitled to recover the amount expended in repairs from the defendant, on the ground that at the time of action brought the premises were not in fact out of repair, but that he was only entitled to recover nominal damages. Where the lessor sues for the breach of the covenant to repair before the expiration of the term, the tenant is entitled to a deduction, in the nature of a discount, for the immediate payment. *Witham v. Kershaw, supra*.

The measure of damages for a breach of a covenant to leave in repair is the amount of money necessary to put the premises into the state of repair required by the covenant. *Jogner v. Weeks* (C. A. 1891), 1891, 2 Q. B. 31, 60 L. J. Q. B. 510, 65 L. T. 16, 39 W. R. 583.

Where there has been a breach of a covenant to repair, and the landlord is himself compelled to do the repairs after the determination of the term, the landlord is entitled as part of the damages recoverable by him to a compensation for the loss of the use of the premises which has presumably been suffered during the time while the repairs were being executed. *Woods v. Pope* (1835), 1 Bing. N. C. 467, 1 Scott, 536; *Proudfoot v. Hart* (1890), 25 Q. B. D. 42, 59 L. J. Q. B. 129.

The tenant is not entitled to show, in mitigation of damages, that the landlord has, by an arrangement with the incoming tenant, relieved himself from the necessity of expending his own money upon the repairs. *Rawlings v. Morgan* (1865), 18 C. B. (N. S.) 776, 31 L. J. C.

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P. 185, 11 Jur. (N. S.) 564, 12 L. T. 348, 13 W. R. 746; *Joyner v. Weeks, supra*.

Where the landlord has recovered damages for breach of a covenant to repair during the term, and sues for the breach of a covenant to leave in repair at the end of the term, the measure of damage is the cost of putting the property in repair less the amount recovered in the first action with an allowance to the tenant for the depreciation of the property. *Henderson v. Thorne* (1893), 1893, 2 Q. B. 164, 62 L. J. Q. B. 586, 69 L. T. 430, 41 W. R. 509.

Where the property is sublet, and the undertenant has notice of the obligations of his immediate landlord, the covenants of the undertenant to keep and leave in repair are treated as analogous to a covenant of indemnity. *Ebbetts v. Conquest* (C. A. 1895), 1895, 2 Ch. 377, 64 L. J. Ch. 702, 73 L. T. 69, 44 W. R. 56. The analogy, as was pointed out in *Ebbetts v. Conquest*, must not be pressed too far, for in every case, so far as can be judged, the Court has refused to allow the original lessee to recover, as part of the damages payable by the undertenant, the costs of the proceedings brought against him by the superior landlord. *Short v. Kalloway* (1839), 11 Ad. & Ell. 28; *Penley v. Watts* (1841), 7 M. & W. 601, 10 L. J. Ex. 229; *Walker v. Hatton* (1842), 10 M. & W. 249, 11 L. J. Ex. 361, 2 Dowl. N. S. 263; *Smith v. Howells* (1851), 6 Ex. 730, 20 L. J. Ex. 377.

AMERICAN NOTES.

The first two principal cases are cited by Wood on Landlord and Tenant, sect. 388; and by Taylor on Landlord and Tenant, sects. 358, 359, and the doctrine is approved. The latter author says: "These cases establish that where there is a general covenant to repair, the age and condition of the house at the commencement of the tenancy are to be taken into consideration in considering whether the covenant has been broken; and that a tenant who enters into an old house is not bound to leave it in the same state as if it were a new one. He must put the property in as good condition as can be done without change of form or material."

In *Ardesco Oil Co. v. Richardson*, 63 Pennsylvania State, 162, it was held that where a company leased a leaking iron oil-tank, with a wooden bottom, the lessee agreeing, in lieu of rent, to put it "in perfectly good repair," this did not imply anything more than putting it in as good condition as possible with a wooden bottom. The Court asked: "If a landlord should lease to a tenant a house with a shingle roof, which leaked badly, and bind the tenant to put the house in perfectly good repair, would it be the understanding of the parties that he was to repair the roof with the same kind of materials, although it might not be as tight or as warm, as permanent, or as secure against fire as a slate roof?" "The words, 'perfectly good repair' do not mean that any particular material must be used. Iron, brass, copper, lead, zinc, wood, or stone may be used, if either will make such a job as was con-

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templated by the parties when they entered into this agreement." "If you are to repair a wooden building, you are not to make it brick, stone, or iron, but you are to repair wood with wood." So although iron bottoms were in use it was held that the lessee was not bound to substitute one.

No. 9. — **VANE v. LORD BARNARD (or LORD BERNARD'S CASE.)**

(CH. 1716.)

RULE.

A COURT of Equity will interfere, at the instance of those entitled in remainder, to restrain a tenant for life without impeachment of waste, from committing an act of wanton or malicious destruction.

Lord Bernard's Case.

Pre. Ch. (Finch) 454-455 (s. c., s. u. *Vane v. Lord Barnard*, 2 Vern. 738; Eq. Cas. Abr. 399, pl. 3).

Tenant for Life. — Waste. — Equitable Waste.

[454] A Court of equity will not only grant an injunction to stay tenant for life, without impeachment of waste, from defacing the mansion-house, but will likewise oblige him to put it in the same plight it was in at the time of his entry.

Lord Bernard was tenant for life, without impeachment of waste; and this bill was brought against him by those in remainder, for an injunction to stay his committing of waste; and by the proofs in the cause it appeared that he had almost totally defaced the mansion-house, by pulling down great part, and was going on entirely to ruin it; whereupon the Court not only granted an injunction against him, to stay his committing further waste, but also ordered a commission to issue to six commissioners, whereof he to have notice, and to appoint three on his part; or, in default thereof, the six commissioners to be named *ex parte*, to take a view, and to make a report, of the waste committed; and that he should be obliged to rebuild, and put it in the same plight and condition it was at the time of his entry thereon; and it was said that the like injunctions had frequently been granted in this Court; and that the clauses of without impeachment of waste never were extended to allow the very

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destruction of the estate itself, but only to excuse from permissive waste; and therefore such a clause would *not [* 455] give leave to fell and cut down the trees which were for the ornament or shelter of a house, much less to destroy or demolish the house; and so it was ruled in my Lord NOTTINGHAM'S time, 2 Ch. Cas. 32.

ENGLISH NOTES.

A tenant for life is not entitled to commit an act of voluntary waste. *Lewis Bowles' Case* (1617), 11 Co. Rep. 79 *b.*, Tudor Lead. Cas. Conv. 37, 3rd ed. But may at the common law, where the property is limited to him without impeachment of waste, deal with the property as if he were tenant in tail, *s. c.* There is no remedy against a tenant for life for an act of permissive waste. *Re Cartwright, Aris v. Newman* (1889), 41 Ch. D. 532, 58 L. J. Ch. 590.

This right of a tenant for life without impeachment of waste, to deal with the property as the absolute owner was restricted by the Court of Chancery. This gave rise to the distinction between legal and equitable waste, a distinction in recent times recognized by the legislature, which has provided that, "an estate for life without impeachment of waste shall not confer, or be deemed to have conferred, upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such waste;" Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (3).

The Court of Chancery interposed in cases of waste upon two grounds. First, where the interest of the parties presented an obstacle to an application to the common-law Courts.—The person in remainder must have had an immediate estate of inheritance to entitle him to proceed in a common-law action, and where the limitations were to A. for life, remainder to B. for life, remainder over in fee, the tenant for life in possession could (at common law) commit waste with impunity so long as a life estate was interposed between his interest and the inheritance. This was the subject-matter of a decree for an injunction so early as the reign of Richard II. *Anon.* (1600) Moo. 554. At the common law, contingent uses were not recognized as having any existence until the use had vested on the happening of the contingency. *Lewis Bowles' Case* (1617), 11 Co. Rep. 79 *b.*; *Udal v. Udal* (1649), Aleyn. 81. At one time, where a tenant in fee with an executory devise over, whether the limitations were legal or equitable, committed waste, the Court of Chancery would have interfered to stay waste. *Robinson v. Litton* (1744), 3 Atk. 209; *Sturfield v. Hubberham* (1804),

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10 Ves. 273, 278, 7 R. R. 409, 412. It is however now settled that this power of a Court of Equity will only be applied in the case of equitable waste. *Turner v. Wright* (1860), 2 De G. F. & J. 234, 29 L. J. Ch. 598. It is however settled that a tenant in fee with an executory devise over may be made impeachable for legal waste. *Blake v. Peters* (1863), 1 De G. J. & S. 345, 32 L. J. Ch. 200. In *Garth v. Cotton* (1750), 1 Ves. 524, 526, 1 Dick. 183, 1 Wh. & Tnd. Lead. Cas. Eq. 806, 6th ed., estates were limited to A. for 99 years if he should so long live, without impeachment of waste, voluntary waste excepted; remainder to trustees during his life to preserve contingent remainders; remainder to the first and other sons of A. in tail; remainder to B. in fee. Before a son was born, A. and B., acting in collusion, cut down timber on the estate and divided the plunder. Subsequently a son was born to A., and he was held entitled to recover from the representatives of B., the share of the proceeds of sale received by the latter in respect of the timber.

But the jurisdiction of the Court of Chancery was chiefly invoked to restrain the commission of equitable waste. The definition has always been expressed in somewhat large terms. It is called "extravagant and humoursome waste," in *Abraham v. Bubb*, Freem. Chy. 54 (No. 10, p. 495, *post*). In *Aston v. Aston* (1749), 1 Ves. Sen. 264, Lord HARDWICKE said: "If tenant for life without impeachment of waste pulled down farm houses, in general I should no more scruple restraining him, than I should from pulling down the mansion-house (unless he pulled down two to make into one in order to bear the burden but of one) it tending equally to the destruction of the thing settled. If therefore he should grub up a wood settled, so as to destroy the wood absolutely, I should restrain him; which is the meaning of the words in that case, 5 Jac. I. [an *Anonymous Case* cited by Lord HARDWICKE], viz. Such voluntary, malicious, intended waste; and in *Abraham v. Bubb*, Pasc. 1680 (said to be in a manuscript of Lord NOTTINGHAM's collection, which I believe I have also seen) it is termed extravagant and humoursome waste." From the same case (*Aston v. Aston*), it appears that Lord HARDWICKE first determined that trees planted for ornament and shelter were to be protected from the ravages of tenants for life. He says: "Since *Lord Bernard's Case* (the principal case) I have gone farther, and restrained the taking down trees planted for ornament and shelter to the house, as in the case of *Packington v. Layton* (3 Atk. 215), and other cases; but a little farther still in *Sir Francis Charlton's Case*, who was restrained from cutting down timber growing in an avenue and planted walk in a park; but it depended on the same principle; and though there was a lane between the house and park, yet it was the same kind with *Packington's Case*, where the

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house stood in the park; they being planted to answer the house and for its ornament and shelter." The Court will upon the same principle restrain a tenant for life from committing equitable waste upon trees which he has himself planted. *Coffin v. Coffin* (1821), 6 Madd. 17, Jac. 70, 23 R. R. 1. The principle has been extended to a clump of fir trees on a common some two miles from the house. *Marquis of Downshire v. Lady Sandys* (1801), 6 Ves. 107; and to trees planted for the purpose of excluding objects from view. *Day v. Merry* (1810), 16 Ves. 375, 10 R. R. 200. In *Marquis of Downshire v. Lady Sandys*, *supra*, an appeal was made in vain to Lord ELDON, upon æsthetic considerations; his answer was: "The principle upon which the Court has gone seems to be, that if the testator or the author of the interest by deed had gratified his own taste by planting for ornament, though he had adopted the species the most disgusting to the tenant for life, and the most agreeable to the tenant in tail, and upon the competition between these parties the Court should see that the tenant for life was right, and the other wrong in point of taste, yet the taste of the testator, like his will, binds them: and it is not competent to them to substitute another species of ornament for that which the testator designed. The question, which is the most fit method of clothing an estate with timber for the purpose of ornament, cannot be safely trusted to the Court." So in *Lord Mahon v. Lord Stanhope* (1808), 3 Madd. 523 n. SIR WILLIAM GRANT, M. R., said: "As the Court cannot determine what is ornamental timber, it being merely a matter of taste, they therefore say, that what was planted for ornament must be considered as ornamental."

It is not the practice of the Court to restrain an act of meliorating waste. *Doherty v. Allman* (H. L. 1878), 3 App. Cas. 709, 39 L. T. 129, 26 W. R. 513; *Meux v. Cobley* (1892), 1892, 2 Ch. 253, 61 L. J. Ch. 449, 66 L. T. 86; *Re McIntosh & Pontypriidd, &c. Co.* (1892), 61 L. J. Q. B. 164. "If a tempest had produced gaps in a piece of ornamental planting, by which unequal and discordant breaks and divisions were occasioned, it would be going too far to hold, that cutting a few trees to produce an uniform and consistent, instead of an unpleasant and disjointed appearance, should be construed waste." *Per* Sir WILLIAM GRANT, M. R., *Lord Mahon v. Lord Stanhope*, *supra*. So too a tenant for life may cut ornamental timber, if it is necessary for the preservation of that remaining. *Baker v. Sebright* (1879), 13 Ch. D. 179, 49 L. J. Ch. 65. A tenant for life would be entitled to pull down a mansion house, and to build a new one in a more desirable position. *Morris v. Morris* (Ch. App. 1858), 3 De G. & J. 323, 28 L. J. Ch. 329, 5 Jur. N. S. 229.

Ornamental timber has been protected, although the mansion-house

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has been pulled down, in two cases: *Wellesley v. Wellesley* (1834), 6 Sim. 497; *Morris v. Morris* (1847), 16 L. J. Ch. 201, 11 Jur. 196, affirming 15 Sim. 505.

Where the person entitled in remainder was entitled to maintain an action of trover for timber felled, he was not entitled to an account unless his bill contained a prayer for an injunction. *Parrott v. Palmer* (1834), 3 My. & K. 632. The reason why an account was allowed in that case was, according to Lord HARDWICKE, "to prevent multiplicity of suits." *Jesus College v. Bloome* (1745), 3 Atk. 262, Amb. 54. In the case of mines opened an account would be decreed, although no injunction was prayed by the bill. *Bishop of Winchester v. Knight* (1717), 1 P. Wms. 406; *Parrott v. Palmer*, *supra*. In the case of equitable waste, an account would be decreed although an injunction was not prayed. *Duke of Leeds v. Lord Amherst* (1846), 14 Sim. 357, 2 Phill. 117, 15 L. J. Ch. 351, 16 L. J. Ch. 5, and the cases there cited. This case is reported at a later stage of the proceedings. 20 Beav. 239. The account directed to be taken by the decree could not be accurately taken, but the master had arbitrarily charged the defendants with a sum of £42,000. To this the defendants excepted; but the exceptions were overruled, on the ground that the defendants, who were executors of the actual wrong-doer, could not be heard to complain that every presumption consistent with the facts was made against them as representing the estate of the deceased.

The older cases must now be read subject to the Settled Estates and Settled Land Acts. These statutes applicable are, the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), the Settled Land Act, 1882 (45 & 46 Vict. c. 38), the Settled Land Act, 1884 (47 & 48 Vict. c. 18), and the Settled Land Act, 1890 (53 & 54 Vict. c. 69).

By the Settled Estates Act, 1877, s. 4, the Court may sanction leases, whether involving waste or not, under the following conditions. A mining lease must be made to take effect in possession, and the term must not exceed 40 years. The rent must be the best rent, but need not be a uniform rent, and during the first 5 years of the term a nominal rent may be reserved. In estimating the best rent the value of a surrendered lease may be taken into consideration. *Re Rawlin's Estate* (1865), L. R., 1 Eq. 286, 13 L. T. 626, a decision on earlier statutes having the same effect. The lease must be by deed, and a counterpart must be executed by the lessee. Every lease must contain a proviso for re-entry if the rent is unpaid for a period not exceeding 28 days. A proportion of the rent has to be set aside and capitalized. The Court may also insist on the insertion of "covenants, conditions, and stipulations" which it may deem expedient; s. 5. The power contained in this section is generally exercised with regard to the interests

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of those entitled in remainder. *Tolson v. Sheard* (C. A. 1877), 5 Ch. D. 19, 46 L. J. Ch. 815, 36 L. T. 756. *Re Farnell's Settled Estate* (1886), 33 Ch. D. 599. By section 16 of the same statute the Court can authorize the sale of timber, not being ornamental timber. The exception of ornamental timber is probably subject to the provisions of section 4, that no lease shall authorize the felling of any trees "except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations, or other works authorized by the lease."

By the Settled Land Act, 1882, the tenant for life may grant a mining lease for a term not exceeding 60 years, whether the lease involves waste or not: sect. 6. This by the definition clause includes a lease of "mines and minerals whether already opened or in work or not:" sect. 2 (10), iv. The lease must be by deed to take effect in possession not later than 12 months after its date, and reserve the best rent that can reasonably be obtained, regard being had to any fine paid: sect. 7. A past voluntary expenditure cannot be taken into account in estimating the rent. *Re Chawner's Settled Estates* (1892), 1892, 1 Ch. 192, 61 L. J. Ch. 331, 66 L. T. 745, 40 W. R. 538. Every lease must contain a covenant for payment of the rent, and a proviso for re-entry upon non-payment of rent for a period not exceeding 30 days: sect. 7 (3). A counterpart of the lease must be executed by the lessee: sect. 7 (4). The rent may be estimated by the acreage worked, by the amount of mineral gotten, by the price realized by the mineral gotten, and with or without a dead rent: Settled Land Act, 1882, s. 9: Settled Land Act, 1890, s. 8. With the sanction of the Court, a lease embodying the terms of the custom of the district, may be granted: Settled Land Act, 1882, s. 10. Where new mines are opened, then unless a contrary intention is expressed in the settlement, three-fourths of the rent must be capitalized if the tenant is impeachable of waste, one-fourth if he is not so impeachable: sect. 11. Where a fine is received it is treated as capital: Settled Land Act, 1884, s. 4.

Timber may be cut and sold by the tenant for life, impeachable for waste, on obtaining the consent of the trustees, or an order of the Court: Settled Land Act, 1882, s. 38. Three fourths of the net proceeds must be capitalized: *ibid.* The section is perfectly general in its terms, and would apparently extend to ornamental timber, as there is no such exception as was contained in the Settled Estates Act, 1877, s. 16.

The tenant for life may throw the costs, not exceeding one-half of the annual rental of the settled land, of rebuilding the principal mansion-house upon capital moneys under the Act: Settled Land Act, 1890, s. 13 (IV.) In the Court of Appeal the opinion has been expressed

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that the whole rental of the property in settlement must be taken into account in estimating the amount which may be laid out in rebuilding. *Re Lord Gerard's Settled Estates* (C. A. 1893), 1893, 3 Ch. 252, 63 L. J. Ch. 23, 69 L. T. 303. Property in hand, however, must be excluded, unless it is usually let but is for the moment without a tenant. *Re Walker's Settled Estates* (1894), 1894, 1 Ch. 189, 63 L. J. Ch. 314, 70 L. T. 259.

AMERICAN NOTES.

The general doctrine in this country is that a Court of equity will interfere by injunction to stay waste, where it appears that the tenant is doing or threatening an injury not warranted by the lease or the title by which he holds, and there is no adequate remedy at law, either because of peculiar value in the thing taken or destroyed or the tenant's inability to respond in pecuniary damages. *Griffin v. Sketoe*, 30 Georgia, 300; *Porch v. Fries*, 3 C. E. Green (New Jersey Equity), 204; *Hastings v. Perry*, 20 Vermont, 272; *Green v. Keen*, 4 Maryland, 98; *Natom, &c. Co. v. Clarkin*, 14 California, 544; *Howze v. Green*, Phillips (Nor. Car. Equity), 250; *Kidd v. Dennison*, 6 Barbour (New York Supr. Ct.), 9; *McCay v. Wait*, 51 *ibid.* 225; *Ware v. Ware*, 2 Halsted (New Jersey Chancery), 11; *Canal Co. v. Comegys*, 2 Carter (Indiana), 469; *Basore v. Henkel*, 82 Virginia, 474.

The remedy by injunction is applicable to every species of waste, it being to prevent a known and certain injury. *Hawley v. Clowes*, 2 Johnson's Chancery (New York), 122.

In *Duwall v. Waters*, 1 Bland (Maryland Chancery), 569; 18 Am. Dec. 350, the Court said: "Waste is a wrong which cannot always be duly estimated and remunerated in damages; it is an injury which requires to be met, in its onset or earliest approaches, by a strong and decisive preventive remedy, acting with a promptness almost amounting to surprise and yet affording to the party restrained a speedy hearing. No adequate remedy of this kind, it is evident, can be obtained from a Court of common law, open only at short intervals during the year, acting from term to term, and limited to a given set of technical forms of procedure. Hence it is that the remedy has been so constantly, in modern times, sought in the Court of Chancery, which is always open, constantly accessible, and is capable of moving with an energy and despatch called for by the emergency and suited to the peculiar nature of the case."

By the Codes in this country, the issue of injunction is generally confined to cases of "irreparable injury," but this is an elastic phrase, and is construed very liberally. Under the pressure of "the chancellor's foot" it becomes very much extended.

That any remainderman may have the tenant for life restrained from committing waste is well established. *Kane v. Vanderburgh*, 1 Johnson Chancery (New York), 11, KENT, Chancellor; *Freeman v. Reagan*, 26 Arkansas, 373; *Van Syckel v. Emery*, 18 New Jersey Equity, 387; *Camp v. Bates*, 11 Connecticut, 51; 27 Am. Dec. 707; *Smith v. Daniel*, 2 McCord Equity (So. Car.),

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143; 16 Am. Dec. 641; *Frank v. Brunneman*, 8 West Virginia, 462; *Williamson v. Jones*, 39 West Virginia, 231; 25 Lawyers' Rep. Annotated, 222 (petroleum); *Hughes v. Barriss*, 85 Missouri, 660; *Duncombe v. Felt*, 81 Michigan, 332; *Dickinson v. Jones*, 36 Georgia, 97; *Donnett v. Dennett*, 43 New Hampshire, 499; *Clement v. Wheeler*, 25 New Hampshire, 361; *Cannon v. Barry*, 59 Mississippi, 289; *University v. Tucker*, 31 West Virginia, 621; *Calvert v. Rice*, 91 Kentucky, 533; 34 Am. St. Rep. 240; even a tenant in common in remainder. *Miles v. Miles*, 32 New Hampshire, 147; 64 Am. Dec. 362. Against a tenant in dower. *Dalton v. Dalton*, 7 Iredell Equity (Nor. Car.), 197. Against a tenant by curtesy, *Ware v. Ware*, 6 New Jersey Equity, 117, even if he has a possibility of sharing in the fee. *Farabow v. Green*, 108 North Carolina, 339. See generally, 3 Pomeroy's Equity Jurisprudence, sect. 1348, citing the principal case, and observing that this remedy "has not only virtually superseded the old common-law action of waste" but has to a great extent taken the place of the action on the case for damages." 2 Beach on Injunctions, sect. 1178; High on Injunctions, sect. 680, citing the principal case.

The principal case is cited in *Clement v. Wheeler*, 25 New Hampshire, 361, as "a leading authority upon this point," and is precisely followed; the Court giving a history of the phrase, "without impeachment of waste."

No. 10. — ABRAHAM *v.* BUBB.

(CH. 1679, 1680.)

No. 11. — WILLIAMS *v.* WILLIAMS.

(K. B. 1810.)

RULE.

A TENANT in tail after possibility of issue extinct is entitled to commit waste.

A Court of Equity will however interpose to prevent an act of wilful or malicious waste on the part of the tenant in tail after possibility of issue extinct.

Abraham v. Bubb.

2 Freem. Ch. 53-55 (s. c. nom. *Abrahall v. Bubb*, 2 Swanst. 172 n; 19 R. R. 51).

Waste. — Tenant after Possibility. — Wilful and Malicious Act of Waste. — Injunction.

One Abraham (to whom the plaintiff is heir) upon his marriage did settle the lands, upon which the waste in question was intended to be committed, to the use of himself and his wife, [53]

and the heirs of their two bodies; afterwards the husband dieth without issue; his wife, being then tenant in tail after possibility of issue extinct, marrieth the defendant; and she and her second husband having felled some trees in a grove that grew near, and was an ornament to the mansion-house, and having an intent to fell the rest, the plaintiff, to whom the lands did belong in remainder, preferred his bill to restrain her from felling those trees, and to have an injunction to stay the committing of waste.

It was insisted upon by the defendants, that tenant in tail after possibility of issue extinct, is by the law dispunishable of waste, as appears in *Lewis Bowles's Case*, 11 Co. Rep. 80 and 1 Inst. 27 b., Lit. sect. 352, and in the case of *Lewis Bowles* it is held, that if a lease be made *absque impetitione rusti*, the tenant is not only dispunishable of waste, but the property of the trees is in him if he fell them; and in the case of *Wentworth v. Wentworth* it was held by all the Judges of England, that tenant in tail after possibility of issue extinct is dispunishable of waste, and so is *Lewis Bowles's Case*, 11 Co. Rep. 80.

[* 54] * PER CURIAM: The law formerly was held to be, that if there were tenant for life, without impeachment of waste, that this did only create an impunity to the tenant for life, although it was the express provision of the party, 4 Co. Rep. 63. But afterwards in *Lewis Bowles's Case*, 11 Co. Rep. 80, the opinion was, that these words did vest a right and interest in the tenant for life, and did give him liberty to fell and take the trees to his own use; for there is an express provision of the party; but in the case of tenant in tail, after possibility of issue extinct, that is the provision of the law only; and though in some cases *fortior est dispositio legis quam hominis*, yet that shall not be to incumber estates.

But in many cases, where a person is dispunishable in law for committing of waste, yet this Court shall enjoin him; as where there is a tenant for life, remainder for life, remainder in fee, the tenant for life shall be restrained from committing of waste by the injunction of this Court; though if he do commit waste no action of waste will lie against him (*sed semble*, that an action of trover will lie for the reversioner, because the property of the trees is in him); and though this action of trover be a new remedy, yet it is a just remedy; and though this was a remedy not known heretofore, yet it is just; and it must be admitted that the law is

better understood now than formerly it was, and the law by experience and practice is improved, and learned men by study see farther and farther into the depth of it; *per Cancellar*'.

And he said that in my Lord Chief Justice ROLLE's time, in the case of *Eudall v. Eudall* (1 Cro. 242, Allen, 84), ROLLE was of opinion, that an action of trover would lie for the reversioner against tenant in tail after possibility of issue extinct, for trees cut down by him; and my LORD CHANCELLOR declared he was of that opinion, though he could not be punished by an action of waste, because he had only an impunity if he committed waste, but no interest in the trees; but Pemberton argued *fortiter e contra*.

And my LORD CHANCELLOR said, if there be tenant for life without impeachment of waste, if he goeth to pull down houses, &c., to do waste maliciously, this Court will restrain, although he hath express power by the act of the party to commit waste; for this Court will moderate the exercise of that power, and will restrain extravagant humorous waste, because it is *pro bono publico* to restrain it, and he said he never knew an injunction denied to stay the pulling down of houses by tenant for life without impeachment of waste, unless it were to Serjeant Peck in my *Lord Oxford's Case*, cited Cro. Eliz. 777, and he said he did believe he should never see this Court deny it again; and he cited the *Bishop of Winchester's Case*, who made a lease for twenty-one years, without impeachment of waste, of lands that had many trees upon it; the tenant cuts down none of the trees till about half a year before the expiration of his term, and then goeth to felling down the trees, and in that case he was enjoined by this Court; for though he might have felled trees every year from the beginning of his term, and then they would have been growing up again gradually; yet it is unreasonable that he should let them grow till towards the end of his term, and then sweep them all away; for though he had a power to commit waste, yet this Court will model the exercise of that power. This case he said was in print, reported by J. Jones, but upon search I cannot find it.

And he cited the *Lady Exlin's Case*, where there was tenant for life, remainder to the first son for life, without impeachment of waste, with remainders over; the first son, by the leave of the lessee of tenant for life, comes upon the land and fells the trees.

 No. 11. — *Williams v. Williams*, 12 East, 209, 210.

although he could not in that case be punished by an action of waste, yet he was enjoined by this Court.

In the end this case was referred, and if they could not agree, then to be set down again; but my LORD CHANCELLOR discovered his inclination *fortiter* for granting an injunction.

Williams v. Williams.

12 East, 209–221 (11 R. R. 357).

Waste. — Tenant after Possibility.

[209] By settlement before marriage the husband's estate was conveyed to trustees to the use of the husband for life, *sans waste*; remainder to trustees to preserve contingent remainders; remainder to the use of the wife for life, for her jointure, and in bar of dower; remainder to the first and other sons of the marriage in tail male; remainder to the first and other daughters in tail male; remainder to the heirs of the body of the husband and wife; remainder to the right heirs of the husband. The wife survived the husband, and had no issue; and after possibility of issue by the husband extinct; *held*, that she was tenant in tail after possibility, &c.; that she was unimpeachable of waste, and was entitled to the property of the timber when cut by her.

This was a case sent by the LORD CHANCELLOR for the opinion of this Court (15 Ves. 419).

Daniel Williams, now deceased, was, prior to his marriage with Catherine Williams, then Catherine Prosser, seised in fee-simple of certain estates hereinafter mentioned; and by indentures of lease and release of the 7th and 8th of Oct. 1787, made between him of the first part, J. Prosser and Catherine Williams (then Prosser), daughter of the said J. Prosser, of the second part, and

T. Griffin and A. Barnes (trustees) of the third part; after [* 210] reciting *the intended marriage, it was witnessed that in consideration thereof, and of £1000 paid by John Prosser to Daniel Williams for the marriage portion of Catherine, and for settling the lands, &c., after mentioned to the uses therein limited and declared, &c. Daniel Williams conveyed to the trustees and their heirs a messuage and other premises called New Wonastow, and other closes of land named in such settlement, containing together 130 acres; and also a tenement and lands belonging thereto, called Worthy Brook Lands, containing 75 acres, all in the parish of Wonastow; to hold to the trustees and their heirs to the use of Daniel Williams in fee until the marriage, and after

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that to his use for life, without impeachment of waste; remainder to the use of the trustees to preserve contingent remainders; remainder to the use of Cath. Prosser for life, for her jointure, and in bar of dower; and after the several deceases of D. W. and C. P., remainder to the use of the first and other sons of the marriage in succession in tail male; remainder to the first and other daughters of the marriage in succession in tail male; and in default of such issue, to the use of the heirs of the bodies of Daniel Williams and Catherine Prosser; and in default of such issue, to the use of the right heirs of Daniel Williams for ever. The indenture also contained a power to Daniel Williams during his life, and after his decease to Catherine Prosser during her life, by indenture to demise and lease all or any part of the premises for any term of years not exceeding 21 years, to commence in possession, and not in reversion, or by way of future interest, so as no such demises or leases by any express words therein contained, should be made dishonourable of waste.

The marriage between Daniel Williams and Catherine Prosser afterwards took place, but they never had any *issue. [*211] And Daniel Williams afterwards, by his will, properly executed and attested, dated the 5th of Feb. 1803, devised, from and after the decease of Cath. Williams, all his messuage, lands, &c., called New Wonastow and Worthy Brook, in the parish of Wonastow, and all other the settled lands, to his nephews Evan Williams and Daniel Williams (the plaintiffs) as tenants in common in fee. The testator died in 1804, and left Catherine his widow, and his said two nephews, him surviving; one of whom, Evan Williams, is his heir-at-law. Upon the testator's death his widow entered into and hath since been in possession of the settled estates. There are a great many oak and ash timber trees growing on such settled estates so devised to the plaintiffs: and the defendant, Catherine Williams, having threatened to cut them down, in order to sell the same for her own use, the plaintiffs filed their bill in Chancery against her, praying for a perpetual injunction, to restrain her from cutting down any timber trees growing upon the settled estates. To which bill the defendant demurred, because the plaintiffs were not entitled to such relief: and it was insisted by her, that she took such estate and interest in the settled estates by virtue of the said indentures of lease and release, as entitled her to cut the timber growing upon them for

No. 11. — *Williams v. Williams*, 12 East, 211–213.

her own benefit. And upon the argument of such demurrer the LORD CHANCELLOR ordered this case to be made for the opinion of the Court, upon the following questions.

First, Whether the defendant, Catherine Williams, were unimpeachable of waste upon the estate and premises comprised in the indentures of lease and release or settlement in the bill mentioned?

Secondly, Whether, having cut timber thereon, she be [* 212] entitled to the timber so cut, *as her own property? And,

thirdly, Whether the defendant's estate for life merged in the tenancy in tail after possibility of issue extinct?

Dampier argued for the plaintiffs in last Michaelmas term, and contended for the negative of the several questions proposed. If Catherine Williams were to be considered as tenant in tail after possibility of issue extinct, he admitted, upon the direct authorities of Co. Lit. 27 b., and 2 Inst. 302, that she was not impeachable of waste; though it did not follow that the timber cut would be her property. But, first, he denied that her estate for life merged in her remainder in tail after possibility. Co. Lit. 28 a, *Lewis Bowles's Case*, 2d Resolution, 11 Co. Rep. 80. a & b. The two estates are said to be equal in quantity, and to differ only in quality; therefore there can be no merger; for that is only where a greater and a less estate come together in the same person. A life estate may be exchanged (*Ibid.*) with a tenancy in tail after possibility, &c.; which shows their equality as to quantity; and it would be absurd that one estate equal in quantity to another should merge in that other; and by the third resolution in *Lewis Bowles's Case*, 11 Co. Rep. 81, the life estate does not merge in the estate tail after possibility, &c. There, indeed, the tenant for life with remainder in tail after possibility, &c., was held entitled to the timber of the barn which was blown down; but there are these distinctions between the two cases, that there the husband and wife were before the birth of issue seised of an estate tail in possession, liable only to be divested by the birth of issue male and converted into estates for life without impeachment of waste,

with remainder in tail: and after the birth and death of [* 213] the issue * male, and the death of the husband, the wife was held not to be tenant in tail after possibility, &c., but to have the privilege of such a tenant for the inheritance which was once in her. Now here the widow is merely seised of an estate for life, with a remainder in tail after possibility, &c., in

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succession; and in the same deed power is given her to lease for 21 years on condition of making the lessee punishable for waste. [BAYLEY, J. That power was necessary, otherwise the first son of the marriage coming into possession would not have been bound by the lease. Lord ELLENBOROUGH, C. J. If she cut down trees, at whose suit could she be impeached for waste?] Supposing the person entitled to the intervening remainder in tail after possibility, &c., were not the same person as the tenant for life in possession, such intervening remainder would not divest the right of the first tenant in remainder of the inheritance to the timber: then it seems to follow that if the estate for life be not merged, the same person having the two estates in succession would not affect the right of the owner of the inheritance. Another question arises, Whether these estates, having been settled upon the wife *provisione viri*, be not within the stat. 11 H. VII., c. 20, made against alienations by the wife of the lands of her deceased husband settled upon her for life or in tail. In *Cook v. Winford*, Hil. 1701, 1 Eq. Cas. Abr. 221, and *ib.*, 400, by the name of *Cook v. Whaley*, a jointress, who was tenant in tail after possibility, &c., was held to be within the statute, and therefore restrained from committing waste; the timber being part of the inheritance. That case, if accurately reported, is decisive; but search has been made, and no account of it is to be found in the Registrar's book; therefore some *doubt has been [*214] thrown upon it, otherwise the present question would not have been sent here. But even before the statute, such tenant in tail after possibility could not have suffered a recovery and aliened the inheritance: yet if she could cut and convert the timber to her own use, which is often of more value than the mere soil, part of the land might be taken and wasted, against the manifest intention of the statute. And as timber passes by the word "land," this case falls within the precise words of the statute: and there is no reason for restraining the words of it, as this case is equally within the mischief meant to be guarded against. The only difficulty is upon the remedy given by the statute, which is by entry, and which cannot apply to timber cut; and also upon the proviso at the end, that the widow may aliene for her life, which is equally inapplicable to the same subject-matter. But, by Lord COKE, Co. Lit. 365, b.,¹ the effect of the statute is to strip every

¹ *Vide* the cases upon the exposition of the statute collected there, and in p. 326 b

tenant in tail *provisiōe viri* of the power of cutting timber, as a mode of alienating the inheritance. [BAYLEY, J. Do you mean to contend that if the tenant in tail had had issue, she could not have cut timber?] If she were a jointress *provisiōe viri*, she could not. [Lord ELLENBOROUGH, C. J. It is one thing to say that timber standing is land; but it is another question whether committing waste by cutting it down can be said to be an alienation of the land.] A jointress *provisiōe viri* could not sell the timber standing; but if she could cut it down and then sell it, she would be enabled to do that indirectly which the law does not allow to be done directly. But supposing the widow [* 215] was not impeachable of waste, still *she has no property in the trees when cut down; for it is said in *Herlakenden's Case*, 4 Rep. 63, *a.*¹ that "if tenant in tail after possibility, &c., fell the trees, the lessor (*i.e.*, there, the next in remainder of the inheritance) shall have them; for inasmuch as he has but a particular interest for life in the land, he cannot have an absolute interest in the trees; but he shall not be punished in waste, because his original estate is not within the statute of Gloucester, c. 5. [LE BLANC, J. That was not the point in judgment: and it is introduced with, "It is said," &c.] In *Abraham v. Babb*, 2 Show. 69 and 2 Freem. Chy. 53 (p. 495, *ante*), Lord Chancellor FINCH took the same distinction, and restrained such a tenant from doing waste; and referred to *Eudall v. Eudall*² for the opinion of Lord C. J. ROLLE to the same effect. And in *Whitfield v. Bewil*, 2 P. Wms. 240, Lord MACCLESFIELD held that the property of timber cut down by tenant for life belonged to the first [* 216] remainder-man in *tail, though there were intervening

¹ See vide *Pyne v. Dor*, 1 T. R. 55 (and the cases there cited).

² In the report of *Abraham v. Babb*, in Freem. Chy. 54, Lord C. J. ROLLE is stated to have been of opinion in *Eudall v. Eudall*, that trover would lie for the reversioner against tenant in tail after possibility, &c. for trees cut down by him; but that case, which is to be found by the name of *Edall v. Edall*, in Alleyne, 84, and of *Eredall v. Eredall*, M. 24 Car. II., in B. R. in 2 Rol. Abr. 119, was not the case of tenant in tail after possibility, but the case of A. tenant for life, remainder to his first and other sons in tail, remainder to B., and to his first and other sons in tail; and A. having no issue, cut the timber. And it was held that the

possibility of the estate tail which might come to A.'s son, if he had any, was no impediment to B.'s son C. (or, as Alleyne has it, another remainder-man in tail), who was then the first tenant in tail, maintaining trover against A., the tenant for life in possession; the property of the trees when cut being in him who had the immediate inheritance of the land in him at the time when they were cut; though the intervening remainder for life to B. was an impediment to C.'s maintaining an action of waste during B.'s life. Note, The tenants for life there were not made unimpeachable of waste. And this is agreeable to the decision in *Whitfield v. Bewil*, 2 P. Wms. 240.

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estates for life. Now here the question is, who had the first estate of inheritance? Not the tenant in tail after possibility; for such an estate cannot merge an estate for life, but is in itself mergeable in an estate tail, Co. Lit. 28 *a*; but the plaintiff. The situation of the defendant is this; she is tenant for life of an estate impeachable of waste, with remainder to herself of an estate for life without impeachment of waste; remainder to the plaintiffs in fee; the plaintiffs therefore having the first estate of inheritance in remainder are entitled to the timber when cut.

Benyon, *contra*, in arguing for the affirmative of the questions proposed by the LORD CHANCELLOR for the opinion of this Court, said, that though he could not, against the authorities, contend that in strictness a tenancy for life could merge in a tenancy in tail after possibility, &c.; the quantity of both estates being the same, though of different qualities; yet he insisted that the defendant was entitled to enjoy all the interests of the greater estate in possession, notwithstanding her prior estate for life; which was merged, if at all, not in the tenancy in tail after possibility, &c., but in the immediate remainder in tail which she once had before the estate after possibility, &c., arose. For here, he observed, that upon the death of her husband, she became seised for life, with an immediate remainder in tail to her and her husband, while there was a possibility of issue of the marriage; and therefore her remainder in tail was not separated from her life estate by any intermediate state of inheritance; as in *Lewis Bowles's Case*, where there was a vested estate tail in John, the *issue, intervening between the life estate [*217] and the tenancy in tail in remainder; which vested estate tail continued in John, who lived until after the time when the tenancy in tail after possibility arose. But here the remainder in tail in the issue was always in contingency, there having been no issue born. Now during the period when the defendant, tenant for life, had such immediate remainder in tail, and before the tenancy in tail after possibility, &c., arose, the merger of her life estate took place in such immediate tenancy in tail, without any intervening vested estate of inheritance; and not after the commencement of the tenancy in tail after possibility, &c. In this view the third question is not so properly framed in the terms of it as it should have been. [BAYLEY, J., asked if he had looked

at the case of *Sutton v. Stone*, in 2 Atk. 101, in the beginning of which he observed, that there must be some mistake in the report.^{1]} But if the Court should consider that the defendant had only a bare tenancy for life, with a remainder in tail after possibility, &c. ; still, by reason of the latter and greater estate, to the benefits of which she was entitled in possession, she is not impeachable of waste, and has the property in the timber cut. *Lewis Bowles's Case*, 11 Co. Rep. 81 *a*, was decided on the ground that the wife should, on account of the inheritance which was once in her have the same privilege as a tenant in tail after possibility, &c. ; considering that the privilege of such an one plainly was not only to cut the timber but to have the property of it when cut : and there was no question, it was said, but that a woman might be tenant in tail after possibility, &c., of a remainder, as well as of [*218] a possession. * As to the objection, that this interest, coming to the defendant *provisione viri*, is therefore unalienable by the stat. 11 H. VII., and that the cutting of timber by a jointress was held, in *Cook v. Winford*, 1 Eq. Cas. Abr. 221, 400, to be within the prohibition of the statute ; the distinction attempted to be taken in that case is an admission of the general right of tenant in tail after possibility, &c., to cut and enjoy timber ; but that distinction is not supported by any other authority, and much doubt has been thrown upon that case, which is not to be found in the Registrar's book, and has never been acted upon since. The case does not come within the words of the statute, which is against the alienation of lands coming to the wife *provisione viri* : and the application of it to timber is neither consistent with the remedy given by entry, nor to the proviso for the wife to alienate during her life. The reason, too, given in the case why a jointress tenant in tail after possibility, &c., cannot cut timber, because she cannot alienate the land itself, would equally apply to a tenant for life without impeachment of waste, to whom the statute has never been contended to apply : and it is impossible to distinguish the two cases in principle : the one is not impeachable of waste by the act of the parties : the other by the act of law. *Abraham v. Bubb* was not the case of a tenant in tail after possibility, &c., restrained from cutting trees at all, as might be supposed from the short note in 2 Shower, 69, but

¹ This part of the case is noticed in Fearn's Cont. Rem. 81, 4th edit., as not being intelligible.

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restrained from wasting ornamental trees, as it appears by the fuller report of the same case in Freeman, Chy. 53. It is not improbable that the case of *Cook v. Winford*, which was in Hil. 1701, may have been of the same description; for shortly after, in * Hil. 1704, the MASTER OF THE ROLLS decided, Freem. [* 219] Ch. 278, *Anon.*, that a woman tenant in tail after possibility, &c., had a right to cut timber in general; though he had restrained her from cutting ornamental timber, because that seemed to be malicious. Then as to the property of the timber when cut, there can be no doubt that it belonged to the tenant in tail after possibility, &c.; what was said to the contrary in *Herlakenden's Case*, 4 Co. Rep. 63, *a*, was an *obiter dictum*, which was denied to be law in *Lewis Bowles's Case*, 11 Co. Rep. 83, *a*: it was in fact thrown out at a time when the same doctrine was supposed to extend also to prohibit tenant for life, without impeachment of waste, from taking timber when cut. But it has been long settled that tenant for life, sans waste, has the property in the timber when prostrated; and this was recognized in *Pyne v. Dor*, 1 T. R. 55, in this Court, and in the *Bishop of London v. Webb*, 1 P. Wms. 528, in Chancery.

Dampier, in reply, said that a separate estate for life could never merge in a joint remainder in tail; for then the husband's estate for life would in his lifetime have merged in the joint remainder in tail. That this was not so strong a case for a merger, if there could have been any, as *Lewis Bowles's Case*: for there the husband and wife had a joint estate for lives, with a joint remainder in tail, after the intermediate estates tail limited to the first and other sons unborn: but even there, where the estates in possession and in remainder to the husband and wife were both joint, yet it was only held that the joint estate for lives merged *sub modo* in the joint remainder in tail, till issue was born, and then by operation of law the husband and wife became tenants for their lives, remainder, &c. * Here, then, after the death [* 220] of the husband, and while there was still a possibility of issue of the marriage, Catherine Williams could only take a remainder in special tail *sub modo*, that is, till after possibility of issue extinct (and the daughter of a daughter of the marriage could not have taken under that entail); and after that she took a general estate tail after possibility, &c., in remainder after her life estate. And though she should be punishable of waste in

respect of her estate tail after possibility, &c.; yet having such estate *ex provisione viri*, she is within the statute 11 H. VII., which will also extend to jointresses, tenants for lives without impeachment of waste, if the cutting of timber be a species of alienation within the statute, according to *Cook v. Winford*: and it must be taken that the legislature meant to restrain husbands from giving this power to their wives over the husband's estate, which, with respect to the timber, amounts to an absolute grant, inconsistent with the limited grant professed to be made. [LE BLANC, J. The grant of an estate for life without impeachment of waste would take the case out of the statute.] This is claimed, not by the express grant of the husband, but as a privilege of law tenant in tail after possibility takes not by the act of the party, but by the operation of law; and the law only favours such an estate more than a common estate for life (which in other respects it resembles), on account of the heritable nature of the estate which was once in her; but here, the inheritable quality of the estate being gone, nothing but the bare privilege of being dispunishable for waste remained, and the property in the timber cut is gone.

It was intimated that gentlemen had taken notes for a second argument: but the Court said that if upon consideration [* 221] * they had any doubt upon the subject, they would direct the case to be argued again: and afterwards they sent the following certificate:—

This case has been argued before us by counsel; we have considered it, and are of opinion, first, That Catherine Williams is unimpeachable of waste upon the estate and premises comprised in the said indentures of lease and release or settlement in the bill mentioned. Secondly, That having cut timber thereon, she is entitled to the timber so cut as her own property. And, thirdly, That the said defendant became tenant in tail after possibility of issue extinct.

ELLENBOROUGH.

N. GROSE.

S. LE BLANC.

J. BAYLEY.

ENGLISH NOTES.

In regard to the incidents of estates, equity follows the law.

A tenant in fee with an executory devise over is entitled to commit legal waste, but not equitable waste. *Turner v. Wright* (1860), 2 De G. F. & J. 234, 29 L. J. Ch. 598, 6 Jur. (N. S.) 809. Another kind of

owner whose estate is of a limited character is a tenant in tail of estates attached to a title, where the estates and title have been conferred and settled by Act of Parliament. The position of such a tenant in tail was considered in *Attorney General v. Duke of Marlborough* (1818), 3 Madd. 498, 5 Madd. 280, 18 R. R. 273; and the duke was restrained from cutting ornamental timber planted for the ornament and shelter of Blenheim House.

Cases defining equitable waste will be found in the notes to *Fane v. Lord Bernard*, No. 9, p. 488, *supra*.

The modification by certain recent statutes of the law relating to waste is also referred to in the notes to that case. The powers of a tenant for life under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), are conferred on the following persons by sect. 58 of that statute: —

A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, but not including a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services.

A tenant in fee simple with an executory limitation, gift, or disposition over.

A person entitled to a base fee although the reversion is in the Crown.

A tenant in tail after possibility of issue extinct.

The estate of a person having the powers of a tenant for life must be an estate in possession, as opposed to reversion or remainder before he can exercise those powers. *Re Strangways, Hickley v. Strangways* (C. A. 1886), 34 Ch. D. 423, 56 L. J. Ch. 195, 55 L. T. 714, 35 W. R. 83.

AMERICAN NOTES.

The tenant in tail does not flourish on our soil. The first principal case is cited in 3 Pomeroy Equity Jurisprudence, sect. 1318.

No. 13. — Russel v. Smithies, 1 Ans. 96. — Rule.

No 12. — HANSON v. DERBY.

(CH. 1700.)

No 13. — RUSSEL v. SMITHIES.

(EX. EQ. 1792.)

RULE.

A MORTGAGEE in possession is not liable to keep buildings on the mortgaged property in repair, but is liable for an act of wilful waste committed.

Hanson v. Derby.

2 Vernon, 392.

Waste. — Mortgagee in Possession.

[392] On a bill to redeem, an account decreed, and £240 reported due, and exceptions to the report. Pending which the defendant, the mortgagee, commits waste. Court orders the mortgagee to deliver up the possession on the plaintiff giving security to abide the event of the account.

The bill being to redeem a mortgage, on the hearing an account was decreed, and £240 reported due; to which report the plaintiff had taken exceptions. The cause thus standing in court, the LORD KEEPER on a motion and reading affidavits, that the defendant had burnt some of the wainscot, and committed waste, ordered the defendant to deliver up possession to the plaintiff, who was a pauper, giving security to abide the event of the account, Nov. 28th, Reg. Lib. 1700, A. fol. 46.

Russel v. Smithies.

1 Anstruther, 96-97 (3 R. R. 560).

Waste — Mortgagee in Possession.

[96] A mortgagee is not bound to keep up buildings in as good repair as he found them, if the length of time will account for their being worse.

On a bill of foreclosure, it was referred to the Deputy Remembrancer to take an account what the mortgagee had received from the rents, &c., or might have received, without wilful neglect in her. It appeared that the premises (malt-houses, &c.) had been

Nos. 12, 13. — *Hanson v. Derby*; *Russei v. Smithies*. — Notes.

allowed to fall so much out of repair, that the rent fell from £22 to £18. Plaintiff had done some repairs, and had held 40 years.

Graham and Stanley argued, that the mortgagee in possession, being only a trustee till foreclosure, is bound to keep the premises in the same repair as if he was owner, 2 Vern. 392, 3 Atk. 518; and that *the diminution in value should have been [* 97] charged on the plaintiff, as she might have received the difference if she had repaired.

By the Court: —

The mortgagee has done some repairs; and, as the only proof of these repairs being insufficient is the diminution in value, we must confirm the report; for it cannot be supposed that after 40 years' possession, the mortgagee is bound to leave the premises in as good condition as he found them.

ENGLISH NOTES.

The liability of a mortgagee in possession for waste depends upon whether the estate is or is not sufficient to satisfy his charge. *Millett v. Davey* (1862), 31 Beav. 470, 32 L. J. Ch. 122, 9 Jur. (N. S.) 92.

Where the mortgage is by deed, and does not exclude the provisions of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 19, (1), IV., the mortgagee in possession is empowered by that section, "to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract." The section only applies to mortgages executed after the passing of the Act. *Ibid.*, s. 19 (4).

A mortgagee in possession is entitled to an allowance in respect of lasting and permanent improvements. *Shepard v. Jones* (C. A. 1882), 21 Ch. D. 469, 47 L. T. 604, 31 W. R. 308. *Henderson v. Astwood* (P. C. 1894), 1894, A. C. 150.

AMERICAN NOTES.

That a mortgagee in possession may not commit waste is held: *Youle v. Richards*, 1 Saxton Chancery, (N. J.), 534; 23 Am. Dec. 722 (citing *Hanson v. Derby*). *McCormick v. Digby*, 8 Blackford (Indiana), 99; *Onderdonk v. Gray*, 19 New Jersey Equity, 65.

It has been very curtly held that a mortgagee in possession is bound to make ordinary repairs: *Barnett v. Nelson*, 54 Iowa, 41; 37 Am. Rep. 182; "Is bound to use reasonable means to preserve the estate from loss or injury." "Is bound to make all reasonable and necessary repairs, and is re-

No. 14. — *Humphreys v. Harrison*, 1 Jacob & Walker, 581, 582. — Rule.

sponsible for loss occasioned by his wilful default or gross negligence in this respect." 2 Jones on Mortgages, sect. 1126. "He is not even bound to repair defects arising in the ordinary way by waste or decay." Ibid.; *Dexter v. Arnold*, 2 Sumner (U. S. Circ. Ct.), 108 (by STORY, J.); *Shaeffer v. Chambers*, 2 Halsted (6 New Jersey Equity), 518; *McCumber v. Gilman*, 15 Illinois, 381; *Dozier v. Mitchell*, 65 Alabama, 511; *State v. Brown*, 73 Maryland, 485, 515; *Givens v. McCalmont*, 4 Watts (Penn.), 460; *Guthrie v. Kahle*, 46 Pennsylvania State, 331.

No 14. — HUMPHREYS *v.* HARRISON.

(L. C. 1820.)

RULE.

A MORTGAGOR in possession will be restrained from committing waste, if the security is insufficient.

Humphreys v. Harrison.

1 Jacob & Walker, 581-582 (21 R. R. 238).

Waste. — Mortgagor Restrained.

[581] A mortgagee is entitled to an injunction to restrain a mortgagor in possession from cutting down timber, if the land, without it, is a scanty security. It may be extended to cutting down underwood contrary to the usual course of husbandry, but not to underwood generally, although the mortgagor is insolvent.

Mr. Simpkinson moved for an injunction to restrain the defendant, a mortgagor in possession, from cutting timber on the mortgaged premises. The bill, which was for a foreclosure, was filed by the first mortgagee against the mortgagor and second mortgagee, and the affidavit in support of it, stated, that the land without the timber was an insufficient security, and that the timber was not in a fit state to be cut down.

The LORD CHANCELLOR (LORD ELDON).

If it is sworn that the land is a scanty security without the timber, that is sufficient to entitle you to the injunction.

Mr. Wetherell moved to extend the injunction to restrain the defendant from cutting the underwood, which, as well as the timber, was expressly included in the mortgage deed. The plaintiff was proceeding in ejectment to gain possession of the [* 582] premises, and was * apprehensive that the underwood would be cut down in the mean time.

 No. 14. — *Humphreys v. Harrison*, 1 Jacob & Walker, 582. — Notes.

The LORD CHANCELLOR:—

Underwood is always considered as a crop. The defendant must not cut it out of the usual course; but if he cuts it in the usual course, he cannot be restrained any more than from cutting a crop of corn. It would be the same thing as turning him out of possession. But you may take an injunction to restrain him from cutting it contrary to the usual course of husbandry.

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ENGLISH NOTES.

The rule is supported by *Hippesley v. Spencer* (1820), 5 Madd. 422, and *King v. Smith* (1843), 2 Hare, 239.

A mortgagor in possession has no right as against his mortgagee to remove fixtures, otherwise than in the ordinary course of his trade, and as a legitimate act of that trade. *Huddersfield Banking Co. v. Lister & Co.* (C. A. 1895), 1895, 2 Ch. 273, 64 L. J. Ch. 523, 72 L. T. 703, 43 W. R. 567. The question in that case arose in the winding-up of the defendant company.

After a decree for an account under a bill for foreclosure, the mortgage will be enjoined not to cut timber. *Goodman v. Kine* (1845), 8 Beav. 379. And the order was made without a prayer for an injunction being contained in the bill. *s. c. Wright v. Atkins* (1813), 1 Ves. & Bea. 313, 314, 13 R. R. 204, 205 n.

AMERICAN NOTES.

The doctrine in question is sustained by the following authorities: *Thompson v. Lynam*, 1 Delaware Chancery, 64; *Bank of Chenango v. Cox*, 11 C. E. Green (New Jersey Equity), 452; *Robinson v. Preswick*, 3 Edwards Chan. (N. Y.), 246; *State Savings Bank v. Kercheval*, 65 Missouri, 682; 27 Am. Rep. 310; *Ensign v. Colburn*, 11 Paige (New York Chancery), 503; *Gray v. Baldwin*, 8 Blackford (Indiana), 164; *Maryland v. Northern C. R. Co.*, 18 Maryland, 193; *Nelson v. Pinegar*, 30 Illinois, 473; High on Injunctions, sects. 480, 693, 694, citing the principal case; *Youle v. Richards*, 1 New Jersey Equity, 534; 23 Am. Dec. 722; *Coker v. Whitlock*, 54 Alabama, 180; *Harris v. Bannon*, 78 Kentucky, 568; *Dorr v. Dudderar*, 88 Illinois, 107; *Verner v. Betz*, 46 New Jersey Equity, 256; 19 Am. St. Rep. 387; Thomas on Mortgages, sect. 684; Kerr on Injunctions, p. 262, citing the principal case; *Brady v. Waldron*, 2 Johnson Chancery (New York), 148; 3 Pomeroy on Equity Jurisprudence, p. 2077, citing the principal case; 2 Beach on Injunctions, sect. 1173, citing the principal case; *Hastings v. Perry*, 20 Vermont, 272; *Scott v. Wharton*, 2 Henning & Munford (Virginia), 25; *Buckout v. Swift*, 27 California, 433; 87 Am. Dec. 90.

As a general rule equity will not interfere to restrain a mere diminution of the security, nor unless the security is *endangered* by the mortgagee's acts.

No. 14. — *Humphreys v. Harrison.* — Notes.

1 Jones on Mortgages, sect. 681, citing the principal case; *Coker v. Whitlock*, 54 Alabama, 180; *Buckout v. Swift*, 27 California, 433; 87 Am. Dec. 90; *Harris v. Bammon*, 78 Kentucky, 568; *Van Wyck v. Alliger*, 6 Barbour (New York Supreme Ct.), 507; *Moriarty v. Ashworth*, 13 Minnesota, 1; 19 Am. St. Rep. 203. In the last case the Court observe: "While some authority may be found in support of the claim of the appellant that a mortgagee is entitled to an injunction restraining any acts of waste by a mortgagor in possession which may diminish the value of the mortgaged property, yet the great weight of authority, both in England and this country, is to the effect that equity will not interfere in such cases unless the acts complained of are such as may render the security insufficient for the satisfaction of the debt, or of doubtful sufficiency." *King v. Smith*, 2 Hare, 239; *Humphreys v. Harrison*, 1 Jacob & W. 581; *Hippesley v. Spencer*, 5 Madd. 422; *Harper v. Aplin*, 54 L. T., N. S., 383; *Coker v. Whitlock*, 54 Alabama, 180; *Scott v. Wharton*, 2 Hen. & M. (Va.) 25; *Buckout v. Swift*, 27 California, 433; 87 Am. Dec. 90; *Vanderslice v. Knapp*, 20 Kansas, 617; *Harris v. Bammon*, 78 Kentucky, 568; *Van Wyck v. Alliger*, 6 Barb. (N. Y.) 507, 511; Snell's Equity, 304; 1 Watson's Comp. Eq. 746; 2 Story's Eq. Jur. sec. 915; High on Injunctions, 2nd ed., secs. 693, 694; Bispham's Equity, 4th ed., sec. 433; 1 Jones on Mortgages, 4th ed., sec. 681; 1 Lead. Cas. Eq., 4th Am. ed., 992, 1021; Kerr on Injunctions, 2nd Am. ed., 84. In numerous other cases we find that the Courts, in stating the grounds upon which equity will interfere, seem to regard it as a necessary condition that the sufficiency of the security be threatened. See *Cooper v. Davis*, 15 Connecticut, 556; *Gray v. Baldwin*, 8 Blackford (Ind.), 164; *Hastings v. Perry*, 20 Vermont, 272; *Fairbank v. Cadworth*, 33 Wisconsin, 358. From the proposition which we have stated as an established principle of equity, it is not to be understood that equity will not interfere unless the acts threatened are such as may reduce the value of the mortgaged property below the amount of the debt. On the contrary, as was considered in *King v. Smith*, 2 Hare, 239, we think that the mortgagee is entitled to be protected from acts of waste which would so far impair the value of the property as to render the security of doubtful sufficiency. He is entitled to have the mortgaged property preserved as sufficient security for the payment of his debt, and it is not enough that its value may be barely equal to the debt."

In *Fairbank v. Cadworth*, 33 Wisconsin, 358, it was held, that where the security was inadequate or scanty, the injunction should issue although the mortgagor was solvent. The Court said: "No good reason is perceived why the pecuniary condition of the mortgagor should be a consideration of any importance. The land is the primary fund for the payment of the debt secured by the mortgage. The mortgagee may resort in the first instance to the land for payment, and it would be inequitable to permit the mortgagor wantonly to destroy or impair the security, whether he be solvent or insolvent." Distinguishing *Robinson v. Russell*, 24 California, 167, where the mischief threatened was the removal of fruit and growing nursery stock, and was not irreparable, and an averment of insolvency was therefore held essential.

DISCOVERY.

No. 1. — *LYELL v. KENNEDY*.

(H. L. 1883.)

No. 2. — *BIDDER v. BRIDGES*.

(C. A. 1885.)

RULE.

IN an action for the recovery of land, as in other actions, the plaintiff is entitled to discovery as to all matters relevant to his own and not to the defendant's case.

But a party is not bound to answer interrogatories which are merely directed to the discovery of the evidence by which he (the other party) intends to prove his case.

Lyell v. Kennedy.

8 App. Cas. 217-234 (s. c. 52 L. J. Ch. 385; 48 L. T. 585; 31 W. R. 618).

Discovery. — Interrogatories. — Affidavit of Documents. — Ejectment. — [217]
Action for the Recovery of Land.

In an action for the recovery of land the plaintiff is entitled to discovery as to all matters relevant to his own and not to the defendant's case.

In an action for the recovery of land the plaintiff claimed as assignee of co-heiresses of a deceased intestate owner of the land, and the defendant relied on his possession and also set up the Statute of Limitations: —

Held, reversing the decision of the Court of Appeal, that the plaintiff was entitled to interrogate the defendant as to matters relevant to the pedigree and heirship of his assignors and as to alleged admissions by the defendant that his possession of the land was as trustee for the intestate and her heirs, even though the plaintiff might have other means of proving the facts inquired after; and that the defendant must answer the interrogatories in substance, subject to any privilege against particular discovery which he might be entitled to claim.

Held, also that the defendant must file a proper affidavit of documents.

Appeal from two orders of the Court of Appeal. 20 Ch. D. 484.
(51 L. J. Ch. 439.)

The action was brought in the Chancery division to recover hereditaments near Manchester and mesne profits. The statement of claim alleged that the plaintiff was assignee by deed of co-heiresses of Ann Duncan, deceased intestate, the owner in fee simple in possession of the hereditaments, and that the defendant had admitted that his possession was only as agent, receiver, and trustee for Ann Duncan and her heirs. The statement of defence did not admit the allegations in the claim, and alleged that the defendant had been at the commencement of the action for upwards of twelve years continuously in possession. The plaintiff administered twenty-one interrogatories which, with the documents therein referred to, occupied more than sixty printed pages of the appendix, and of which nineteen related to Ann

Duncan's possession and the alleged admissions by the [* 218] defendant of his * possession as agent and trustee for Ann

Duncan and her heirs. The 20th and 21st related to the pedigree and descent of the co-heiresses. The defendant partly answered the interrogatories relating to Ann Duncan's possession, and submitted that he was not bound to answer the rest, or any of the others; and as to the 20th and 21st interrogatories alleged that in the course and for the purpose of defending his title in this action he had caused to be made by and through his solicitors various searches and inquiries, being the searches and inquiries referred to and inquired after in the interrogatories, and that the results were in the nature of reports made to him by his confidential agents; and that the books, records, and other places in which and the persons from whom such searches and inquiries were made were equally accessible to the plaintiff as to him; and that the interrogatories were not put *bonâ fide* for the purposes of this action. In answer to the usual summons the defendant made an affidavit of documents in which he objected to produce the documents in the second part of the first schedule on the ground that they related solely to the defence of his title, and were communications between himself and his solicitors and his counsel in reference to the defence of his title and prepared or procured for the purposes and in contemplation of such defence. The schedule of those documents comprised (*inter alia*) counter-part agreements for letting a mill on the land in question.

The plaintiff having taken out a summons for a full and sufficient affidavit in answer to each of the interrogatories, and also a sum-

No. 1. — *Lyell v. Kennedy*, 8 App. Cas. 218, 219.

mons for production of the documents in the second part of the first schedule, BACON, V. C., dismissed both summonses with costs. On appeal the Court of Appeal (JESSEL, M. R., BRETT, and HOLKER, L. JJ.) affirmed the order of BACON, V. C., on each summons and dismissed the appeals with costs. 20 Ch. D. 484, 51 L. J. Ch. 439.

Feb. 26, 27. *MacClymont* (*Blennerhassett* with him), for the appellant:—

The decision of the Court of Appeal was based upon *Horton v. Bott*, 2 H. & N. 249, 26 L. J. Ex. 267, which decided only that a plaintiff in ejectment cannot *interrogate a [* 219] defendant as to what the defendant's title is, and also upon the notion that before the Judicature Act a plaintiff in ejectment at law could not maintain a bill of discovery in equity in aid of the ejectment, and that in no case had such a bill been allowed. Subsequent research has brought to light fifty-seven cases in the time of Queen Elizabeth (referred to in the Calendars of Chancery proceedings), and a series of cases from the time of Lord NOTTINGHAM, in which bills of discovery were filed in equity in aid of ejectments at law. In some of these cases discovery was decreed, in others it was refused for reasons special to those cases, the general right to discovery being assumed; in none was it held or even argued that such bills would not lie, though they were resisted on every possible ground. Of these cases the most important are — *Attorney-General v. Du Plessis*, Parker, 144, 164, 1 Bro. P. C. 419, in which Lord HARDWICKE said that the right of the Crown to discovery was not a prerogative right, but the same as the right of any subject. *Rumbold v. Forteath*, 3 K. & J. 44, 748; *Brown v. Wales*, L. R., 15 Eq. 146, 42 J. L. Ch. 45; *Drake v. Drake*, 3 Hare, 523, 13 L. J. Ch. 406; *Bennett v. Glossop*, 3 Hare, 578; *Chadwick v. Broadwood*, 3 Beav. 308, 10 L. J. Ch. 242; *Hylton v. Morgan*, 6 Ves. 293, 295; *Butterworth v. Bailey*, 15 Ves. 358; *Crow v. Tyrell*, 2 Madd. 397, 408; *Jones v. Jones*, 3 Mer. 165, 166, 170; *Wright v. Plumtre*, 3 Madd. 481, 486; *Pennington v. Beechey*, 2 S. & S. 282; *Devenreux v. Devenreux*, Ca. temp. Finch (Nelson), 324; *Grey v. Grey*, Ca. temp. Finch (Nelson), 444. The books of practice contain common forms of interrogatories in aid of actions of ejectment: *e. g.* Cole, Eject. and 2 Van Heythuyson's Eq. Draftsman; Spence's Eq. Jur.; Hubback on Succession; and see Wigram, Disc., and

Mitford, Pl. Ch. These authorities carry the case as far as is necessary; but if not, Order xxxi. extends the right to discovery beyond the old practice in equity. It is said that the Orders affect procedure only and not rights, but the question whether evidence can be got by interrogatories before trial is one of procedure. In common-law actions of ejectment interroga-

[* 220] tories were allowed, and by sect. 21 of the *Judicature Act, 1875, all forms of procedure are to continue in force.

The plaintiff can ask anything relevant to his own case, anything which he could ask the defendant in the witness-box in Court. Moreover, he can ask what case the defendant is going to make against him at the trial, *e. g.*, whether he is going to deny that the plaintiff is heir, or to set up some other heir. *Eade v. Jacobs*, 3 Ex. D. 337; *Towne v. Cocks*, L. R., 9 Ex. 45, 43 L. J. Ex. 41; *Sketchley v. Conolly*, 11 W. R. (Q. B.) 573; *Harland v. Emerson*, 8 Bli. (N. S.) 62, 83. As to discovery of documents: since the decision of the Court of Appeal in this case the Court of Appeal in *Daniel v. Ford*, W. N. (1882), p. 165, W. N. (1883) p. 27, 47 L. T. 575, has held that no affidavit of documents can be required from a defendant in such an action, but the authorities are all the other way; it is enough to cite *Ferrier v. Atwood*, 12 Jur. (N. S.) Ch. 365; *Attorney-General v. Gaskill*, 20 Ch. D. 519, 526; *Felkin v. Lord Herbert*, 30 L. J. Ch. 798; *Minet v. Morgan*, L. R., 8 Ch. 361, 365, 42 L. J. Ch. 627; *Attorney-General v. Corporation of London*, 2 Mac. & G. 247, 19 L. J. Ch. 314, 319; *Balguy v. Broadhurst*, 1 Sim. (N. S.) 111, 20 L. J. Ch. 55; *Wright v. Vernon*, 1 Drew. 344, 22 L. J. Ch. 447, *Goodall v. Little*, 1 Sim. (N. S.) 155, 161, 20 L. J. Ch. 132; *Greenwood v. Greenwood*, 6 W. R. (Ch.) 119; *Nolan v. Shannon*, 1 Molloy, 169; *Saull v. Browne*, L. R., 17 Eq. 402, 43 L. J. Ch. 568; *Harris v. Harris*, 3 Hare, 452, 13 L. J. Ch. 349; *Jenkins v. Bushby*, 35 L. J. Ch. 401; *New British, &c. Company v. Ped*, 3 C. P. D. 196. The plaintiff may inspect the defendant's title-deeds if the recitals help the plaintiff to make out his own case. *Coster v. Baring*, 2 Com. Law Rep. 811.

[The arguments and authorities on both sides as to what particular interrogatories were allowable, and to what extent they must be answered; as to what documents were privileged from inspection; and as to the effect of the Statute of Limitations; are omitted, the House not having determined these questions.]

Feb. 27, March 1, 2. Horton Smith, Q. C., and O. L. Clare, for the respondent: —

The decisions below were right. This is only a common-law * action of ejectment with sundry statements designed [* 221] to evade the Statute of Limitations. The plaintiff's conveyance was after the twelve years had run, and was a mere purchase of a pretended title. In a simple ejectment the plaintiff could not before the Judicature Act and therefore cannot now claim discovery. The common-law practice must prevail, for this action could not before the Judicature Act have been brought in equity. In equity there was no right to discovery; and therefore none under the Common Law Procedure Act, 1854: *Horton v. Bott*, 2 H. & N. 249, 26 L. J. Ex. 267. In *Flitcroft v. Fletcher*, 11 Ex. 543, 25 L. J. Ex. 94, discovery was allowed to a defendant in ejectment, but in *Edwards v. Wakefield*, 6 E. & B. 469, that decision was doubted, and was eventually overruled. *Stoate v. Rew*, 14 C. B. (N. S.) 209, 32 L. J. C. P. 160; *Pearson v. Turner*, 16 C. B. (N. S.) 157, 33 L. J. C. P. 224; *Wallen v. Forrestt*, L. R., 7 Q. B. 243, 41 L. J. Q. B. 96; *Finney v. Forwood*, L. R., 1 Ex. 6, 35 L. J. Ex. 42. On grounds of public policy the defendant ought not to be obliged to help the plaintiff to turn him out; a plaintiff in ejectment must recover by the strength of his own title alone. The cases cited *contra* do not establish the propositions contended for. In *Coster v. Baring*, 2 Com. Law Rep. 811, no decision was given, the parties having compromised. In *Sketchley v. Conolly*, 11 W. R. (Q. B.) 573, the interrogatory allowed was, "Is some one else the real defendant?" In *Towne v. Cocks*, L. R., 9 Ex. 45, 43 L. J. Ex. 41, the decision was wrong; and the case was not thoroughly argued. Moreover tithes are an exception to the general rule, and come within the jurisdiction of equity: see *Belwood v. Wetherell*, 1 Y. & C. Ex. 211. *Eade v. Jacobs*, 3 Ex. D. 337, 47 L. J. Ex. 74, was a case of landlord and tenant; and its real effect is explained in *Attorney-General v. Gaskill*, 20 Ch. D. 529, 51 L. J. Ch. 870. No case exists where a bill of discovery lay merely in support of an action of ejectment at common law. In the cases cited, for some reason such as loss of title-deeds, fraud, or the like, the plaintiff was obliged to come to equity and then he got such discovery as equity allowed. In *Attorney-General v. Du Plessis*, Parker, 146, the bill was for relief. In *Brown v. Wales*, L. R., 15 Eq. 146,

[* 222] collusion was *alleged; the present objection was not taken, and it was a case of landlord and tenant, which stands on a different footing. In *Rumbold v. Fordeath*, 3 K. & J. 44, 748, and *Harland v. Emerson*, 8 Bli. (N. S.) 62, there were outstanding legal estates, and an allegation that the plaintiff could not proceed at law and must come to equity. In *Wright v. Vernon*, 1 Drew. 344, there was an outstanding term. Not only is there no authority in favour of the appellant, but there are authorities to the contrary effect. The rule laid down in 1 Maddock's Ch. Pr. 3rd ed. p. 276, is that "The title of an heir is a legal one, nor is he, it seems, entitled to discovery, unless there are incumbrances standing in the way, which the Court would remove to enable him to assert his legal right." He cites *Tanner v. Morse*, in Trin. T. 7 G. II. (Unreported), and *Lady Shaftesbury v. Arrow-smith*, 4 Ves. 66 (4 R. R. 181). To the same effect are *Mutloe v. Smith*, 3 Anst. 709 (4 R. R. 854); *Crouch v. Hickin*, 1 Keen, 385, 390, 391; *Armitage v. Wadsworth*, 1 Madd. 189; *Pennington v. Beichey*, 2 S. & S. 282. In *Drake v. Drake*, 3 Hare, 523, the application failed; so in *Bennett v. Glossop*, 3 Hare, 578. The decision, in *Crow v. Tyrrell*, 2 Madd. 397, 402, went on fraud. There must always have been some equitable ground for the discovery sought, and here there is none. The books of practice do not carry the case further than the cases already discussed, and the rest of the appellant's authorities have no bearing on the matter. The Judicature Act, 1873, sect. 25, does not alter the rule of public policy above stated, and Order XXXI. only relates to procedure and does not affect rights. The Chancery Consolidated Order xv. rule 4, is still in operation, and the defendant may decline answering interrogatories to which he might demur, as he might to these under the old practice. In any case the defendant is not bound to make a "full and sufficient affidavit" in answer, as asked for by the summons. Seton on Decrees, ed. 1877, p. 141. As to the documents, the counter-part agreements shall be produced, and this is all the plaintiff is entitled to.

The House took time for consideration.

[* 223] * March 19. EARL OF SELBORNE, L. C. :—

My Lords, the action in this case (brought in the Chancery Division of the High Court of Justice) is to recover possession of real estate in England, with mesne profits, by a legal title. The plaintiff exhibited interrogatories, in the ordinary course, to

No. 1. — *Lyell v. Kennedy*, 8 App. Cas. 223, 224.

obtain discovery from the defendant of certain matters which (as I understand them) are all relevant to the plaintiff's, and not to the defendant's case. To these interrogatories (with an exception, which I need not more particularly mention) the defendant has in effect refused to give any answer; and in that refusal he has been upheld by the judgments of Vice-Chancellor BACON and the Court of Appeal.

I should be very sorry to encourage appeals to your Lordships' House from interlocutory orders upon interrogatories raising no question of principle. But this appeal does raise an important question of principle.

The decision of the Court of Appeal, as understood by both parties, proceeded upon the general ground that a plaintiff in ejectment, claiming by a legal title, is entitled to no discovery, even of matters relevant to his (the plaintiff's) own case, from the defendant in possession. It was held (I think correctly) that the right of discovery under the present rules of the Supreme Court is not in principle more extensive than it formerly was in the Court of Chancery; and the plaintiff's counsel was challenged to produce authorities in support of the right of a plaintiff, in an action of ejectment at law, to file and obtain an answer to a bill of discovery in equity. This, as I understand, he was not at that time prepared to do; and it seems to have been concluded that the settled course of practice in equity was against the existence of such a right, and that this practice was founded upon principles which are, indeed, altogether beyond question; viz., that a plaintiff in ejectment at law must succeed (if at all) by the strength of his own title, and that it is against public policy to assist him in searching into the evidences of the defendant's title. Reference was also made to a case at law of *Horton v. Bott*, 2 H. & N. 249; 26 L. J. Ex. 267, in which a discovery of matters relevant only to the defendant's title was very properly refused. It does not, however, appear to me to follow * from those principles, or from the case of *Horton v. Bott*, that a plaintiff in an action of ejectment, suing upon a legal title, ought to be denied that discovery of matters within the defendant's knowledge, and tending to support, not the defendant's but the plaintiff's case, to which a plaintiff at law would be entitled in any other kind of action.

In the argument before your Lordships the appellant's counsel

produced a series of authorities which if they had been cited in the Court of Appeal might not improbably have satisfied that Court (as I believe they have satisfied all your Lordships) that bills of discovery in aid of the title of plaintiffs at law, in actions of ejectment, were neither unknown to the Court of Chancery nor excluded by any rule or practice of that Court; on the contrary, that they were dealt with in the same manner and on the same principles as similar bills in other cases.

If there had been such a course of practice as that supposed, it must have been familiar to the leading writers on the law of discovery, — Sir James Wigram and Mr. Hare. There is, however, no trace of it in the learned treatises of either of those authors. What they say is inconsistent with it.

Mr. Hare's work was published in 1836, before that of Sir James Wigram, by whom it is much commended. He says (page 198): "That which has been said of the action of ejectment" (quoting Lord MANSFIELD's words in 4 Burrow, 2487, "The plaintiff cannot recover but upon the strength of his own title," &c.) "seems not less applicable to every suit seeking to change the right and the possession of property." "A case has been put of an ejectment brought against a party in possession who cannot, by filing a bill against the plaintiff in the action, compel a discovery of his title-deeds by merely" (I may observe that in Mr. Hare's book the word "merely" is in italics) "alleging that they would show that he had no title. The defendant is left to sustain his case or defend his possession as he may. The purposes of justice are accomplished in affording to the plaintiff all the evidence that tends to establish affirmatively the facts upon which he insists."

Sir James Wigram (2nd edition, 1840, page 14) lays down what he calls "the two cardinal rules in the law of discovery," as * follows: "First, the right, as a general proposition, of every plaintiff to a discovery of the evidences which relate to his case; and, secondly, the privilege of every defendant to withhold a discovery of the evidences which exclusively relate to his own." In the several "propositions" founded on these two cardinal rules, which he proceeds to formulate, and to the elucidation of which the rest of his treatise is devoted, his language is equally large; and the exceptions from and qualifications of those rules and propositions which he examines in detail at pages 79-120 do not touch the present question. He states

expressly (page 122) that the expression "every plaintiff" is meant by him to include a plaintiff at law, who files a bill for discovery only in equity, as well as a plaintiff in equity who seeks relief.

Examples of bills for discovery only, in aid of actions of ejectment brought in Courts of law, are found in *Crow v. Tyrell*, 2 Madd. 397, *Wright v. Plumtre*, 3 Madd. 481, *Pennington v. Beechey*, 2 S. & S. 282, *Drake v. Drake*, 3 Hare, 523, *Bennett v. Glossop*, 3 Hare, 578, and *Brown v. Wales*, L. R., 15 Eq. 147, cases which came (all but one of them, on demurrer or plea) before Sir JOHN LEACH, Sir JAMES WIGRAM, and Sir JOHN WICKENS. In four of those cases the demurrer or plea was overruled, and it was held that discovery must be given; in another, a plea of purchase for valuable consideration without notice (as to which see Wigram, *Discovery*, 2nd ed. pp. 81 and 82) was allowed. The sixth came before the Court, after a full answer, upon a motion for the production of deeds, which was refused because the deeds appeared by the pleadings to be evidence of the defendants' title only, and for no other reason. In none of those cases was there the least trace of any objection, in principle, to such a bill of discovery. In one of them (*Drake v. Drake*) Sir JAMES WIGRAM said: "This is a mere bill of discovery in aid of an ejectment. . . . The allegation" (of the plea), "if true, is not in law a bar to the action, and if the plaintiff is entitled to the relief he seeks at law, he is *primâ facie* entitled to discovery also. If the plaintiff is entitled to recovery at law, his right to discovery is, *primâ facie*, incident to his right to the relief; and the defendant can no
* more refuse to give discovery in such a case than he [* 226] could refuse to answer a bill for relief in this Court, where the right to the relief in equity could not be controverted." *Butterworth v. Bailey*, 15 Ves. 358, is another case of a bill of discovery only, in aid of an ejectment at law, which came before Lord ELDON, after a full answer, upon a motion to amend by adding a prayer for relief; which motion was refused, but upon grounds not implying any doubt that the bill, as it stood, was proper according to the course of the Court.

In *Hylton v. Morgan*, 6 Ves. 294, the bill was not for discovery only, but also prayed that the defendant to the action of ejectment might be restrained from setting up outstanding terms. Lord ELDON refused an interlocutory motion for an injunction, saying,

“There are two ways of proceeding. You may get a discovery in aid of ejectment; but, if you will have equitable relief to aid the trial of your right at law, you must have that relief upon a decretal order prior to the trial at law.” *Jones v. Jones*, 3 Mer. 170, was a case in which the plaintiff, stating in his bill a legal title to land, on which he was about to proceed at law, asked relief, to which a demurrer was allowed. Sir WILLIAM GRANT said: “If this had been a bill merely for discovery, there are several parts of it to which an answer must undoubtedly have been given.”

It was admitted by the learned counsel for the respondent that discovery in aid of an ejectment at law might always be obtained by a bill praying relief, even if the relief were only to prevent the setting up of outstanding terms. It is unnecessary to consider whether the present action, in a Court which can give both discovery and relief, may not (for this purpose) be equivalent to a bill praying relief: because the right to discovery really rested upon the same principles, whether relief was prayed or not, and whether there was or was not any special equity beyond that which was, in all cases alike, the foundation of the right to discovery. Upon this point, Sir James Wigram’s authority may again be referred to. He states (pages 5 and 6) that the distinction between bills of discovery and bills for relief, “so far as principle is concerned, has no real existence. . . . The right of [* 227] *discovery is, in both cases, founded upon one and the same principle.” (See also page 122 of the same work.)

I am, therefore, of opinion that the general ground on which the judgment appealed from appears to have proceeded, cannot be maintained; and that, unless the whole matters inquired into by the interrogatories, which the defendant has not answered, are irrelevant to “the plaintiff’s case about to come on for trial,” in the words of Sir James Wigram’s second Proposition (Wigram, *Discovery*, p. 15), the defendant must make some sufficient answer to those matters.

The plaintiff claims by conveyance from alleged co-heiresses of Ann Duncan, who died in 1859 being at the time of her death entitled to and seised of the land sought to be recovered in the action, as the defendant admits. The plaintiff will have to prove at the trial that the persons through whom he claims were in fact the heirs of Ann Duncan. In aid of that part of his case, he has addressed to the defendant, by his 20th and 21st interrogatories,

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a series of questions which are certainly not irrelevant. The defendant by his answer, has claimed privilege for any information which he may possess on the subject of those questions, but he has not, to my mind, answered with the particularity and distinctness necessary to reduce the discovery, which he so declines to give, to matters clearly within the privilege which he claims.

If the plaintiff succeeds in establishing the fact of heirship, it will also be necessary for him, at the trial, to repel the defence of the Statute of Limitations, the action having been brought more than twelve years after Ann Duncan's death. Most of the special averments in the statement of claim, and the interrogatories founded on them, have for their object to repel that defence; and, if they are proved in fact (the heirship being also proved), the question will have to be determined at the trial whether they are sufficient for that purpose in law. Unless their insufficiency is so manifest as to make it certain that they raise no question proper for determination at the trial (whatever the facts may then turn out to be), the plaintiff ought to be at liberty to prove this part of his case by all proper means, discovery included.

The case, so set up by the plaintiff, amounts in substance to this, that the possession which the defendant has had of Ann

* Duncan's estate from the time of her death was obtained, [* 228] and retained, by means of the assumption by him of a fiduciary character towards her heirs, whoever they might be; and that he has from time to time made admissions to that effect, acknowledging himself to be accountable on that footing, sometimes by writing under his hand and sometimes on oath, including two letters addressed by him to the plaintiff himself, though before the plaintiff had any title.

The plaintiff, as I understand his pleading, claims the benefit of the fiduciary relation so alleged to have been undertaken by the defendant; and he will, doubtless, at the trial insist that when he commenced his action he was entitled to, and did, affirm and ratify, and that the defendant was estopped from denying, that fiduciary relation. I express no opinion on the question whether this case, if established, will be sufficient in law to repel the defence of the Statute of Limitations; but I think it raises a question proper to be determined at the trial upon such facts as the plaintiff may then be able to prove, and not proper to be prejudged by an interlocutory order upon interrogatories at this stage of the action.

The defendant, therefore, must answer the interrogatories relevant to that portion of the plaintiff's case. It is no sufficient objection that the plaintiff may have, and to some extent (on his own showing) has other means of proving the facts inquired after. Admissions of the facts by the defendant might simplify the proof and materially diminish the expense of trial. Of the interrogatories in detail (of which I cannot approve the length) no more need now be said than that I think they ought generally to be answered in substance, subject to any privilege against particular discovery which the defendant may be entitled to claim.

A subordinate question arose upon a summons for the production of certain documents admitted by the defendant's affidavit of documents, filed on the 4th of November, 1881, to be in his possession or power, as to some of which he appears to have intended to claim privilege under the doctrine of *Claggett v. Phillips*, 2 Y. & C. C. C. 86, *Pearse v. Pearse*, 1 De G. & S. 12, and other well-known authorities; while as to others he probably [* 229] intended to object to their * production as not being relevant or material to any question to be determined at the trial; though (if the plaintiff should succeed at the trial) they may then become relevant to the consequential account. On comparing the third paragraph of the affidavit, in which protection is claimed for those documents, with the body of the second part of the first schedule in which they are described, the description does not appear to me to agree, as it ought to do, with the claim of privilege. But I think that the respondent ought to be permitted to remove this difficulty, which now stands in his way, by a further and better affidavit, if he is able to do so; which, as to some at least of the documents described in the latter portion of the schedule, appears to be extremely doubtful.

What I propose to your Lordships is, to reverse the orders appealed from, and to remit this case to the Court below, with a declaration that the respondent ought to put in a further and better answer to the appellant's interrogatories, and also to file a further and better affidavit as to all the documents which he objects to produce. The respondent ought, I think, to pay the costs here, and the costs of the summonses in both the Courts below, whatever may be the result of the action.

Lord WATSON:—

My Lords, at the conclusion of the arguments in this case, I

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was of opinion, with all your Lordships, that the cases cited at the bar for the appellant completely displaced the reasons assigned for their judgment by the Court of Appeal.

The case has been so fully considered in the judgments of your Lordships, which I have had the advantage of perusing, that I shall content myself with saying that the judgment proposed by the LORD CHANCELLOR appears to me to be just in principle and in strict accordance with the settled practice of the Equity Courts.

LORD BRAMWELL:—

My Lords, I agree in the conclusion that has been arrived at by those who have preceded me, and in their reasons. But the respect which is due to learned Judges make me think it desirable to show that I have formed an opinion for myself. And I wish also *to call attention to the principle which [* 230] ought to govern this case, and which, except by Lord Justice BRETT, seems to have been lost sight of.

As a general rule a party to a suit in the Superior Courts has, to support his own case, a right to discovery from his opponent. This must be because the law supposes that the ends of justice will be furthered thereby. But it is said that the case of a plaintiff seeking to recover land is an exception to this rule. I cannot agree. Such an exception can only exist because justice in such suits would not be furthered by such discovery, or because it is not desirable it should be. It seems to me impossible to say the former. The truth will be got at by the same means in suits to recover land as in other suits. We are driven therefore to the only other reason, viz., that in such suits it is not desirable that justice should be furthered thereby, which is impossible. Why should it not? Why not by all the means by which it is furthered in other suits? It was said by my brother BRETT that public policy is opposed to it. Why? It is said that the plaintiff in such a suit recovers on the strength of his own title. Supposing that was true in such suits and in them only, why should he not be at liberty, in order to establish that title, to use the procedure, as in all other suits to prove facts? But the truth is, a plaintiff always, if he recovers, does so on the strength of his own title. If the action is for the detention of a chattel, the plaintiff must show a title to it. If on a bill of exchange, he must show the defendant is a party, and so on. I see no reason in principle for the defendant's contention.

As to the authorities, they are to my mind clear for the plaintiff. After their examination by the noble and learned lord on the woolsack I will not trouble your Lordships with any remarks, except this, that in my opinion *Horton v. Bott*, 2 H. & N. 249; 26 L. J. Ex. 267, was rightly decided, but is no authority for the decision in this case.

I am of opinion that this appeal should be allowed.

LORD FITZGERALD:—

My Lords, I have also arrived at the conclusion that the order of the Court of Appeal cannot be sustained, inasmuch as [* 231] the rule * on which it was supposed to rest does not exist.

There is no principle properly applicable in support of that order, and it seems to me that it does not recommend itself to our notions of justice. There can be no doubt that the Court of Appeal intended to decide, as the reported language of the Lords Justices is so plain and clear. Lord Justice BRETT is reported to have said, "Therefore this action seems to me to be clearly an action brought in order to recover possession of land, and the right to recover is rested upon the legal title of the plaintiff. The question then is whether in such an action the plaintiff can interrogate the defendant upon the matters affecting the plaintiff's title, or, I will put it as high as this, whether he can interrogate the defendant at all." (20 Ch. D. 490.)

The Lord Justice then proceeds to discuss that question, and after some observations on the rule that a plaintiff in such an action must succeed, if at all, on the strength of his own title, he says that the plaintiff "must show that he himself has the legal title to the possession of the property, and must show it entirely by his own means, the defendant not being called upon to answer anything or to disclose anything;" and he adds further on, as a conclusion, "therefore, neither before the Common Law Procedure Act nor afterwards was a plaintiff in ejectment allowed to interrogate a defendant for the purpose of supporting the plaintiff's claim."

The MASTER OF THE ROLLS puts it as forcibly and as clearly. After inquiring whether there was any case in which a Court of Equity had enforced discovery under such circumstances, he observes (20 Ch. D. 488), "There is no such case, and the reason is, that it would be against public policy." And further on he adds, "The rule was that a man must recover in an action of ejectment by the strength of his own title alone, and I think there was a

good reason for it; but, reason or no reason, the course of practice in these actions is conclusive as to the non-existence of the right of a plaintiff in an action of ejectment to file a bill for discovery in aid of his action."

Mr. Horton Smith, in his argument for the defendant, took very high ground indeed when he urged that "the plaintiff can have *no answer,—this is a point of high public policy." [* 232] It did occur to me on the opening that the discussion ought to be a very short one, but the case has been debated at great length, as involving a principle applicable to all actions of ejectment on a legal title when the plaintiff's title is controverted.

A great number of cases were cited and commented on, and we were referred to several text-books of considerable authority. The industry of Mr. MacClymont discovered and brought under our notice several cases in point, and I entirely agree with the noble and learned Earl on the woolsack, as the result of the examination of the authorities, that there exists no rule or practice in equity which forbade the enforcement of discovery in aid of an action of ejectment founded on a legal title, and that, on the contrary, bills of discovery in such cases were entertained, and discovery enforced as in other cases.

Having arrived at that conclusion, the appeal must be allowed, and the defendant must answer. If interrogatories have not been put *bonâ fide*, or are oppressive or irrelevant or scandalous, or are subject to any other valid objection, it will lie on the defendant to apply to strike them out, or he may refuse to answer some of them on special grounds, or he may in the present case seek to postpone some portions of the discovery until the plaintiff has established heirship.

I may be permitted to observe that your Lordships' decision does not in the least trench on the rule or maxim so much relied on in the Court below, that a plaintiff in ejectment must succeed, if at all, on the strength of his own title, and not on the weakness of the title of the defendant in possession, or, in other words, that the plaintiff must prove his title before the defendant can be called on to enter on his defence. Possession is enough for him until the plaintiff has shown a right to take that possession from him. *Melior est conditio possidentis* is not confined to land, though more frequently applied to the actual and visible possession of land than to chattels, for the possession of land has ever been

regarded by the law with some degree of favour, as *primâ facie* evidence of ownership in fee. In *The King v. Bishop of Worcester*, Vaughan, 58, it is said, “When you will [* 233] *recover anything from me it is not enough for you to destroy my title; but you must prove your own better than mine. For it is both rational to conclude you have no right to this, and therefore I have, for without a better right, *melior est conditio possidentis* regularly.”

The plaintiff does not contest this maxim or seek to escape from it. He admits that he must prove his title, and can only succeed on a proved title. He claims to be permitted to prove that title. He seeks to do so now by the examination of the defendant as to his (the plaintiff’s) title, just as he would be entitled to call the defendant as a witness on the trial and examine him as to the pedigree on which the plaintiff relies, or any other step in his title on which the defendant may be a competent witness.

The contention of the defendant, on the other hand, seems to be inconsistent. He says the plaintiff must prove his title, but “he is not permitted to interrogate me now to it, even though I may be the plaintiff’s only witness.” There is nothing in the maxim, and there is nothing in public policy or in the policy of the law, which deprives the plaintiff of the ordinary right of proving his own title by the lips of the defendant.

There was another question discussed in the case on which I desire to guard myself, viz., whether under the Judicature Act and rules the right of discovery is or is not more extensive than it formerly was in Courts of Equity. It was put thus, — the Judicature Act is an Act to regulate procedure, and not to affect established rights, and if there was no right to discovery before the passing of the Judicature Act, there is no right to interrogate now. On these propositions I refrain from expressing any opinion, save that they are stated too largely, for there can be no doubt that the Judicature Act in carrying into effect the object stated in its preamble, “the better administration of justice,” does interfere with and alter rights. If the expressions used be limited to “discovery,” and to administering “interrogatories,” the rules clearly do make an alteration as to what has been called “right;” for example, a Court of Equity in the exercise of its auxiliary jurisdiction did not lend its aid to enforce discovery where the action was in [* 234] respect of a mere tort, * but I should think that a plaintiff

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may now, in such an action exhibit interrogatories and enforce discovery.

It seems to me also not to be very clear that an increased power to exhibit interrogatories to the defendant, and enforce discovery as to the plaintiff's title, or *vice versâ*, is an interference with the right of the party interrogated, or is more than alteration of procedure. Since the passing of the Evidence Amendment Acts, making all parties competent witnesses, it is difficult to see that there can be a "right" in any litigant to refuse to answer proper interrogatories where he is liable to be called as a witness and examined *virâ voce* to the same matters.

The Judicature Act and Order XXXI., seem to confer on the litigant in every action the right to exhibit interrogatories to his opponent, subject to the protection given by the exercise of judicial discretion, and by the succeeding rules of Order XXXI.; and probably the intention was to give the litigant in all cases a right to interrogate his adversary as to every relevant matter on which he could examine him, if he thought fit to call him as his witness on the trial of the cause.

Orders appealed from reversed; with a declaration that the respondent ought to put in a further and better answer to the appellant's interrogatories, and also to file a further and better affidavit as to all the documents which he objects to produce: respondent to pay the costs of this appeal and the costs of the summonses in both the Courts below; cause remitted to the Chancery Division.

Lords' Journals, 19th March, 1883.

Bidder v. Bridges.

54 L. J. Ch. 798-808 (s. c. 29 Ch. D. 29; 52 L. T. 455; 33 W. R. 792).

Practice. — Discovery. — Interrogatories. — Opponent's Case.

The plaintiffs, who were two persons suing on behalf of themselves and [798] all others the proprietors and occupiers of lands or tenements in the parish of M., sought to restrain the defendant, who was the lord of the adjacent manor of W., from inclosing or building on certain land which the plaintiffs alleged formed part of M. common over which they claimed certain commonable rights. One of the plaintiffs was the owner in fee of a mansion-house and grounds, and the other was the owner in fee of a beerhouse and certain cottages, all in the parish of M. The defence was that the land in question was not part of M.

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common, but was common land of the defendant's manor; that if the rights claimed by the plaintiffs had ever existed, they had been extinguished, and that some of such rights could only be claimed in respect of ancient tenements. The defendant further alleged that the beer-house and cottages had no land attached to them or held therewith, that the land in question formed part of the manor of W., and denied that the plaintiffs' tenements were ancient tenements. The rest of the defence amounted to a direct traverse of the plaintiffs' case. The defendant administered interrogatories to the plaintiffs, in effect asking—1. Whether the tenements held by the plaintiffs were ancient; 2. Whether any lands were held with the beerhouse and cottages; 3. Whether the tenements in question were held of any, and what, manor; 4. Whether there had been any user by the plaintiffs or their predecessors in title of the alleged commonable rights:—*Held*, that the plaintiffs must answer the interrogatory No. 2, because as to that the defendant had pleaded a substantive case that the beerhouse and cottages had not any land attached thereto or held therewith; but, inasmuch as the defence was otherwise only a direct denial of the plaintiffs' case, the remainder of the interrogatories, being directed to the discovery of the plaintiffs' evidence, need not be answered.

On appeal by agreement between the parties, the Judges of the Appeal Court, as arbitrators, settled the interrogatories in the form in which they were to be answered, and allowed interrogatories under all four heads.

This action was brought by G. P. Bidder and W. H. Nightingale, on behalf of themselves and all other the proprietors and occupiers of lands or tenements in the parish or vill of Mitcham, in the county of Surrey, for a declaration that a certain piece of land known as Beddington Corner was part of Mitcham Common, and that the plaintiffs and those on whose behalf they sued were entitled to stock the same with their cattle and other commonable beasts at all times of the year, and that they and the inhabitants of Mitcham were entitled to rights of recreation and to other valuable rights, easements, and privileges over the same. The plaintiffs also claimed an injunction restraining the defendant from trespassing on the land or erecting any buildings or [* 799] fences thereon, * and from otherwise intermeddling there-with or interfering with the plaintiffs' enjoyment of their rights over the said land. They alleged in their statement of claim that the inhabitants of Mitcham had as of right from time immemorial used and enjoyed, and still used and enjoyed, for their lawful recreation, the part of the common called Beddington Corner as a town green within the meaning of the 12th section of the Inclosure Act, 1857, and the 29th section of the Commons Act, 1876; and that the owners and occupiers of lands and tenements in the said parish had from time immemorial as of right had and

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enjoyed, and still had and enjoyed, rights of pasture, herbage, and estovers over the whole of Mitcham Common, including the part called Beddington Corner. The plaintiff G. P. Bidder was seized in fee for an estate of inheritance in possession of a freehold mansion-house, with outbuildings and 32 acres of land, situate in the township of Mitcham, and in his own occupation. The plaintiff Nightingale was seized in fee for an estate of inheritance in possession of a freehold messuage used as a beerhouse, and three freehold cottages near thereto, all situate in the parish of Mitcham, and being in the occupation of Nightingale or his tenants. The plaintiffs also alleged that the defendant threatened to inclose, build upon, and appropriate the piece of land called Beddington Corner.

The defendant was lord of the manor of Wallington, and he contended that Beddington Corner formed part of that manor, and that all rights of common over it, if any had ever existed, had been extinguished. He also alleged that the plaintiff Nightingale's beerhouse and cottages had no land attached thereto or held therewith respectively, and that such rights of common as were claimed could only be enjoyed in respect of lands, and not tenements. He also alleged that the rights of estovers claimed could only be enjoyed in respect of ancient tenements, and he denied that the plaintiffs' tenements were ancient. The remainder of his defence amounted to a direct traverse of the plaintiffs' case. The defendant administered to the plaintiffs the following interrogatories:—

1. How long have you, George Parker Bidder and William Henry Nightingale, been respectively proprietors or occupiers of the lands and premises respectively called in your statement of claim "Ravensbury," the "Fountain Beerhouse," and the three cottages, and for what estates or interests, and what is the tenure thereof respectively? Are such respective premises, or were they, or any, and which of them, at, heretofore, and when last, held, or within the limits of any, and what, actual or reputed manors or manor, or subject to any, and what, quit or chief rents or services, and to whom payable or rendered. Set forth which of the manors of Ravensbury, Mitcham, Biggin, and Tamworth, or Vauxhall, extend as you allege over any, and what, parts or part of the land described in your statement of claim as Beddington Corner, and which is in fact Wallington Common but is hereinafter referred to

as Beddington Corner. Are any, and which, of the messuages held by you respectively ancient messuages, or how otherwise, and when were the same respectively built? Have the said "Fountain" and three cottages respectively any, and what, lands appurtenant thereto or held therewith?

2. Have you, George Parker Bidder and William Henry Nightingale, respectively, or your respective predecessors in title, as proprietors or occupiers of any, and what, lands or tenements in the parish of Mitcham, or under any other alleged title, or in any other capacity, ever either placed, kept, or depastured any, and what, kind of commonable beasts, or any other, and what, animals in or upon, or cut or taken furze or gorse upon or from, or dug or taken gravel, sand, or other materials upon or from, or taken part in any, and what, games or sports in or upon either, any, and what, parts or part in particular of Mitcham Common (but not including Beddington Corner therein), or in or upon any, and what, part or parts in particular of Beddington Corner respectively?

3. If Yea, set forth when, and for how long, and whether or not continuously, or at some, and what, intervals, and when first, and when last, and where, and under what alleged title, you or your predecessors in title respectively so depastured animals, or took away furze or gorse, * gravel, sand, or other materials, or took part in games or sports, and whether you or they respectively so depastured animals, or took away gorse, furze, gravel, sand, or other materials, without limit, or subject to any, and what, limit, or did so by any, and what, licence, or in consideration of any, and what, payment, or otherwise, and how and for what purposes you or they respectively applied such gorse, furze, or other materials.

The plaintiffs refused to answer these interrogatories on the ground that they relate exclusively to their own title and did not tend to support the defendant's case, and that the information which was sought was part of the evidence which they intended to adduce at the trial in support of their own case.

The defendant took out this summons to compel the plaintiffs to answer the interrogatories.

Graham Hastings Q. C., and Kingdon, for the defendant. — For the purposes of argument the interrogatories may be classified as asking four questions, — 1. Are the messuages of which the plaintiffs are in possession ancient messuages? 2. Are there any lands

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held with the houses of the plaintiff Nightingale? 3. Are the tenements in question held of any manor? 4. Has there been any user by the plaintiffs or their predecessors in title of the alleged rights over the common? We are entitled to have full and sufficient answers to these interrogatories, inasmuch as they relate to matters material to our case. For example, we clearly have the right to ask whether the plaintiffs' messuages are ancient messuages, because, if not, the rights claimed by the plaintiffs cannot exist. *Luttrell's Case*, 4 Co. Rep. 86a.

We are entitled to ask upon what facts the plaintiffs rely, but we do not seek to know the evidence which they intend to bring forward. *Eade v. Jacobs*, 47 L. J. Ex. 74, 3 Ex. D. 335; *Lyell v. Kennedy*, 52 L. J. 385, 9 App. Cas. 81, 85, 8 App. Cas. 217 (p. 513, *ante*), and *The Attorney-General v. Gaskill*, 51 L. J. Ch. 870, 20 Ch. D. 519.

[KAY, J., referred to *Bray on Discovery*, 446 *et seq.*]

Our questions may be directed to the rebuttal of the plaintiffs' case as well as to the support of our own, and any question which tends to destroy their case is permissible. A defendant is allowed greater licence in this respect than a plaintiff. *Lowndes v. Davies*, 6 Sim. 468, and *Hoffman v. Postill*, L. R., 4 Ch. 673.

[KAY, J., referred to *Ivy v. Kekewich*, 2 Ves. 679, and said that neither party could claim discovery beyond what was necessary to support his own case.]

Documents referred to by a plaintiff or defendant in his answer to interrogatories may be called for even though they relate to the evidence which he intends to use. Unless, of course, they are protected by privilege. *Storey v. Lennon*, 1 Keene, 341, 1 Myl. & Cr. 525, 6 L. J. Ch. 99, and *Lyell v. Kennedy*, 53 L. J. Ch. 937, 27 Ch. D. 1.

Kekewich, Q. C., and P. H. Lawrence, for the plaintiffs, were only called upon with reference to the second class of interrogatories. They admitted that these must be answered.

KAY, J. This case raises an important question as to the right which a defendant has to exact from a plaintiff discovery by means of interrogatories.

Now, the rule is laid down in a book which has always been considered (and I will give in a moment the reason why I say so) of the highest authority on this subject, the late Vice-Chancellor Wigram's book on Discovery. Proposition 2, on page 15, is as

follows: "It is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery, upon oath, as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit." Then Proposition 3 is this: "The right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such [* 801] material facts as relate to the plaintiff's case, * and does not extend to a discovery of the manner in which the defendant's case is to be exclusively established" — that is one thing — "or to evidence which relates exclusively to his case." There are two things which a plaintiff may not require discovery of from the defendant. One is the manner in which the defendant's case is to be established, and the other is the evidence which relates exclusively to that case. Now I turn to page 288, and there, after a very careful examination of a good many authorities, it is stated in *placitum* 375, "The preceding cases must establish, if authority can establish, the original privilege of a defendant to withhold discovery appertaining to his own case alone, and the absence of all original right in the plaintiff to call for such discovery; and from those cases it will be seen that the privilege of the defendant is the same whether he is defendant in an original suit in which relief is sought, or is plaintiff in that suit and is made defendant to a cross-bill for the purpose of discovery." Then in the note are a number of cases which are referred to in the preceding *placita* which I have examined, and which seem entirely to support that statement.

I said that the authority of that book stands as high at this day as it ever did, and I have the highest possible warrant for saying that, because in *Lyell v. Kennedy*, in the House of Lords, Lord SELBORNE says, "It was held (I think correctly) that the right of discovery under the present rules of the Supreme Court is not in principle more extensive than it formerly was in the Court of Chancery." That is one proposition. Then, at pages 224 and 225, he reads the propositions which I have just read from Vice-Chancellor Wigram's book, referring to them as the two cardinal rules on the law of discovery, and referring to that book as being, what I have always considered it to be, a book of the highest possible authority upon these questions of practice in equity. Therefore I must take the rule to be the same in the case of a defendant

seeking discovery now, as it would have been in the case of a defendant seeking discovery by a cross-bill under the former practice in equity; and that rule is in the words which I have read from the book of Sir James Wigram.

Now it is objected to that, that there are certain cases which establish a difference. But first of all, before I consider them, I will refer to the mode in which Vice-Chancellor WIGRAM establishes these propositions, and to certain authorities to which he refers which seem to me very much indeed in point in this present case. It is quite plain, according to those authorities, that if a defendant meets the case of a plaintiff who is seeking to establish some title, whether it be to land or anything else, by a mere direct negative, that would not entitle the defendant under the old practice to file a cross-bill and endeavour by interrogatories in that cross-bill to make out how the plaintiff's case was to be established, or to discover evidence which related exclusively to his case; and it cannot be said that because the defendant meets the plaintiff's case with a direct negative, therefore the evidence which the plaintiff will adduce in support of his own case relates also to the defendant's case in such sense as to entitle the defendant, who only pleads a direct negative, to examine that evidence.

Now, to go at once to the cases from which *dicta* are cited which are supposed to contravene that rule, I will take the case of *Eade v. Jacobs*. It is very important before the *dictum* is read to see what the case of *Eade v. Jacobs* is: "The plaintiffs, as administrators of Isaac Eade, sought to recover possession of certain hereditaments for breach of a covenant contained in a lease." Pausing there, the affirmative case would be to prove that he had committed a breach of covenant. One of the breaches relied on was "that the defendant had during the term made certain alterations in and additions to the demised hereditaments without the consent in writing of the lessor. The defendant pleaded that the alterations and additions were made with the consent and authority of the intestate." Suppose that case came to trial, the case of the plaintiff is, "You have committed a breach of covenant;" the defendant confesses and avoids. He says, "Yes, I have; that is, it would have been a breach of covenant but for this, — that I obtained the consent of the lessor." That is not the plaintiff's case; it is the defendant's case; and the plaintiff interrogated * to know at what date or dates were the [* 802]

alterations made, when did the lessor consent to or authorise the alterations and additions, and so on, and when, and in whose presence, such consent and authority were given. Those were interrogatories by the plaintiff. Clearly that was not a case within the rule. It was a case, *primâ facie*, where the plaintiff was asking the defendant how he made out his own case. But it is quite plain when you read the judgment on what ground the defendant was made to answer, because, after saying the interrogatories had gone too far, these words follow: "Looking at the practice formerly existing in the Court of Chancery, I think that the plaintiff is entitled to a discovery of the facts upon which the defendant relies to establish his case, but not of the evidence which it is proposed to adduce." Then the words "in whose presence" are to be struck out, because that would tend to show what evidence the defendant was going to produce; and then the learned Judge deals with the matter thus: "Then comes the question as to conversations. The old rule of pleading in Chancery was that conversations when relied upon as admissions must be stated in substance and effect; and this was a wholesome rule to be followed, because it prevented the opposite party from being taken by surprise. Nobody would object to that for a moment. The ground on which the judgment goes is, 'Your pleading is defective, you have not set out with sufficient particularity these conversations on which you rely; you must give, in short, further and better particulars.'" That is the whole gist, as I understand it, of the judgment of the Court. If this had been properly pleaded there would have been no room for an interrogatory, there would be nothing which could be asked; but because it was not stated with sufficient particularity,—and therefore the rule of the Queen's Bench Division which entitles a party to further and better particulars in the case of defective pleadings applied to the case,—the discovery there limited in the way I have pointed out was allowed. That is a matter which stands on a principle entirely by itself, and has nothing to do with the case argued. But out of that judgment is picked this *dictum*: "I think the plaintiff is entitled to a discovery of the facts upon which the defendant relies to establish his case, but not of the evidence which it is proposed to adduce." With deference, if that is meant as a general proposition, which I am quite satisfied it is not, I should entirely disagree with it. It seems to me that to ask a plaintiff who has

No. 2. — *Bidder v. Bridges*, 54 L. J. Ch. 802, 803.

properly pleaded his case, "What facts do you rely on to make out your case?" is only another way of asking, "What is your evidence?" If any authority were wanted, it seems to me the authority is as clear as can be. I will take one case of considerable antiquity, decided in 1795, the case of *Icy v. Kekewich*. There "the bill stated that the testator had after the execution of his will contracted for the purchase of an estate, which purchase was completed by his executor, Kekewich, who conveyed to his son; and that they are, or one of them is, in possession; that the plaintiff is heir *ex parte materna*, and that there is no heir *ex parte paterna*. The defendant Kekewich by his answer claimed as heir *ex parte paterna*. The plaintiff by the amended bill prayed that the defendant might set forth" — observe, this was asking the defendant as to the evidence of his case — not merely as to the evidence, but as to the facts on which he relied to make out that he was heir *ex parte paterna* — "in what manner he is heir *ex parte paterna*, and all the particulars of the pedigree, and the times and places or particulars of the births, baptisms, marriages, deaths, or burials of all the persons who shall be therein named." It was not asked, How are you going to prove this thing? Not a word was said as to the evidence by which, or the manner in which, these things were to be established, but only as to the facts of the pedigree. The LORD CHANCELLOR says, "This is a fishing bill, to know how a man makes out his title as heir. He is to make it out, but he has no business to tell the plaintiff how he is to make it out. Allow the demurrer." There are plenty of other cases which seem to me to be entirely consistent with that. Take for instance the case of *Ingilby v. Shafto*, 33 Beav. 31, 32 L. J. Ch. 807. There "upon a bill of discovery in aid of an action at law, the plaintiff is only entitled to a *discovery of [* 803] such matters as make out his own title, and cannot compel a discovery of the particulars of his adversary's title, and how he makes it out. A. brought an ejectment against B., whereupon B. filed a bill of discovery against A., seeking to discover under what title he claimed at law and how he made it out: *Held*, that the defendant was not bound to give this discovery." And there the MASTER OF THE ROLLS gave his opinion first off-hand, and then in a considered judgment repeated the opinion he had before expressed, and he said, "What the plaintiff is entitled to" — that is, the plaintiff in a bill of discovery — "is this: He is entitled

to the discovery of everything in the possession of the other party, either of facts, deeds, papers, or documents, which will help him in making out his case at law; it is confined to that, and he cannot go beyond that. No doubt in cases praying for relief you may do this: you may ask, ‘What defence do you make to my case, and on what ground?’ But that is because the Court requires the case of each party to the suit to be pleaded, in order that neither may be taken by surprise;” and then he refers to Sir James Wigram’s book, and the observations at page 286 and the following pages.

The same learned Judge, in the case of *The Commissioners of Sewers of the City of London v. Glasse*, 42 L. J. Ch. 345, L. R., 15 Eq. 302, which very nearly approached this case in point of fact, decided that a defendant who files interrogatories for the examination of a plaintiff was not entitled to this amount of discovery. The case was a suit on behalf of the plaintiffs and all others the owners and occupiers of land or tenements lying within the forest of Essex other than the waste lands of the said forest, except such of them as were defendants or were alleged to be sufficiently represented by the defendants or some of them; and the object of the suit was to establish in favour of the parties represented by the plaintiffs, as against the defendants (who were the lords of divers manors within the forest, and certain persons who had enclosed pieces of waste lands within the forest), certain rights of common over the whole of the waste land within the forest.

One of the defendants was James Mills, the lord of the manor of Chigwell and West Hatch. He alleged that the rights of common over the waste lands within his manor had been enjoyed by the tenants thereof only, and denied that the occupiers or owners of land within the forest, but not within the manor, had ever enjoyed any right of common over the waste lands of the manor; then he filed interrogatories according to the practice after the abolition of cross-bills for the examination of the plaintiff, and he asked, “Is it not the fact that no owners or occupiers of land within the said forest, but not within the said manor, have ever enjoyed any right of common of pasture over the waste lands of the said manor?” It was clearly a question in support of his own case. Then he went on: “If the plaintiffs allege that they have, let them set forth any instance in which such rights have been enjoyed, and by whom and when, and in respect of what land,

and where such land was situated, and in respect of what cattle or other animals." Again I observe there is not a single question about the evidence, "by whom or by what evidence are you going to prove these things?" but the question is as to the fact,—any instance in which those rights have been enjoyed. The answer was a general traverse of the general proposition: "It is not the fact that any owner or occupier of land within the forest hath ever enjoyed any rights of common." Observe, that is what the plaintiff was bound to plead in answer to the defendant's pleadings, and then he declines to give any answer to the rest of the interrogatory. Lord ROMILLY said, "The party interrogating (whether plaintiff or defendant) was always entitled to discovery of everything which made out his own case or which showed that he was in the right, but not to discovery of matters which supported his opponent's case or showed that his opponent was in the right. If, for example, this defendant had alleged that there were cases in which the rights set up by the plaintiffs had been claimed and successfully resisted, and had interrogated the plaintiffs as to such cases, he would have been entitled to an answer; but the interrogatories simply require the plaintiffs to disclose the evidence in * support of their case." That is, in one sense, [*804] perfectly accurate. He did not ask, "How are you going to prove the facts?" but the facts of which he asked an admission were of no moment or purport in the case at all except as evidence by which the plaintiff was to make out his own case, and he refused to allow them to be answered. In that case it seems that there was only an argument on one side, and the counsel on the side who were arguing that the interrogatories were not properly answered submitted that there was a difference when the answer is to a defendant's interrogatory,—a proposition I have already dealt with by referring to Vice-Chancellor WIGRAM's book—and they referred to two cases, *Hoffman v. Postill* and *Lowndes v. Davies*. *Lowndes v. Davies* I will say no more about than this: that it is a case which is discussed in Vice-Chancellor Wigram's book, at page 289, in which he points out that it stands really alone, and is not consistent with the previous authorities he refers to; and elsewhere in the book he refers to the fact that Vice-Chancellor SHADWELL had shown in many cases a determination so far as he could to assist discovery in almost every case. But he also refers to another case which came before the same learned

Judge when he was a Lord Commissioner, namely, *Hardman v. Ellames*, 2 Myl. & K. 732, 4 L. J. Ch. 181, in which the decision seems to have been not entirely consistent with that in *Lorwades v. Davies*. However, he disputes the authority of *Lorwades v. Davies*, and I cannot find any case in which that has been followed, unless it be the case I am now going to refer to, of *Hoffman v. Postill*. That is a case which, to my mind, as far as the decision goes, is very clear and simple. It was a case in which the bill had been filed by the owners of a patent against the defendant for infringement, and the defendant, having answered the bill, filed a concise statement and interrogatories for the examination of the plaintiff. In his answer he had set up that the patent was void for want of novelty. Everybody familiar with patent cases knows that that is an issue the affirmative of which is on the defendant. He has a perfect right to interrogate as to the want of novelty to any extent he likes, because that is his case and not the plaintiff's case; and accordingly Lord Justice SELWYN and Lord Justice GIFFARD thought that interrogatories which went to that part of the case ought to be answered, and Lord Justice GIFFARD is reported to have used this language: "As regards the case of *Dar v. Eley*, 2 Hem. & M. 725, it must be always remembered that that was the case of a plaintiff exhibiting interrogatories to a defendant, and it was there held that the plaintiff could not call on the defendant to set forth the particulars of his defence. But when you come to the case of a defendant asking questions of a plaintiff, it is a very different thing. It is the defendant's business to destroy the plaintiff's case, and there the defendant had a right to ask all questions which are fairly calculated to show that the patent is not a good patent, or that what he alleges to be an infringement is not an infringement." As to the first branch of that proposition, there could not be, for the reason I have given, the least doubt. It is not the plaintiff's case, but the defendant's case, that the patent is void for want of novelty. The defendant has a perfect right to search the conscience of the plaintiff, and make that out if he can from the admissions of the plaintiff; but to say that this is to be understood as a general proposition, that in every case whatever where a defendant, not by setting up a substantive case of his own, but by merely meeting the case of the plaintiff by a traverse, is entitled, to use these words, to destroy the plaintiff's case, and to ask all the questions he can to do that,

is simply a contradiction of the well-settled rule that the questions which either plaintiff or defendant can ask must be confined to questions which establish their own substantive case, and that they are not entitled to ask questions which relate to the evidence by which or the manner in which their adversary means to establish his own case. I am quite satisfied that so great a Judge as Lord Justice GIFFARD never intended those words, which seem to have been cited in subsequent cases, as they were in * the case of *The Commissioners of Sewers of the City of London v. Glasse*, as establishing the proposition that the defendant has a larger right of discovery than the plaintiff, to have any such significance. He was only dealing with the case before him, in which the defendant was asking questions to set up that substantive case which he had pleaded by way, no doubt, of destroying the plaintiff's case, but which was a matter that he himself, the defendant, was bound to prove, and therefore as to which he had a perfect right to search the conscience of the plaintiff.

Now I think there is only one other case I need refer to, and that is the case of *The Attorney-General v. Gaskill*. That was a case which went before the Court of Appeal, where an action was brought by the Attorney-General and the local board to restrain the defendant from building across a public footpath. The defendant denied the existence of any public right of way over the ground. The plaintiff delivered interrogatories as to the existence of a public right of way, and as to what passed in the conversation at the board meeting, and at a conversation between the defendant and the plaintiffs' solicitor before that meeting. The defendant declined to answer those interrogatories, alleging that as to the right of way he was not bound to answer as to a right which he had denied by his pleadings; and the Court of Appeal, of course, held, as everybody must have held, that that was precisely within the rule as to discovery. The plaintiff was seeking to search the conscience of the defendant, not as to the defendant's case, but as to his own case. He said, "There is a right of way," and he was interrogating the defendant to try and obtain from him admissions that there was such a right of way. That is strictly within the rule as I have read it; and I observe here that, as Lord SELBORNE said in the House of Lords, the late MASTER OF THE ROLLS says, "There appears to have been some misapprehension as to the effect of the

Judicature Acts. They do not alter the rules as to discovery except so far as there are express rules on the subject:” and Lord Justice COTTON somewhat observes on his own judgment in *Eade v. Jacobs*, “which,” he says, “I think has been somewhat misunderstood. In that case the defence had set up a parol agreement which was said to be immaterial, and what I held was this,—that the interrogatories ought to some extent to be limited so as to ask the defendant to give discovery of the substance only of the conversation on which he relied as a defence, and that the person interrogated was not bound to set forth the names of the witnesses or the details of the conversations.” And then, taking the language of the judgment, he says that was expressed in this passage of the judgment, “I think that the plaintiff is entitled to a discovery of the facts upon which the defendant relies to establish his case, but not of the evidence which it is proposed to adduce;” and in the rest of the judgment he says, “modifying in some slight way, the interrogatory has reference to what I laid down as the principle of the decision.” I have already observed upon that judgment, and I think what the learned Judge said and decided was only this: You have not pleaded these conversations as strictly as, according to the practice in Chancery, you are bound to plead them, and therefore you are bound to answer this interrogatory to the extent to which it seeks that statement from you which ought to be contained in your pleadings.

Now I turn to the case before me. [His Lordship referred to the statement of claim, and continued:] That is met by a defence which practically amounts to a traverse; but with respect to the property claimed by Nightingale there is a substantive case set up by the defence, that the beerhouse and cottages in the possession of Nightingale have not any land attached thereto or held therewith. That seems to me to be a matter as to which an answer should be given, because, though it is a small point, a substantive case is set up by the defendant. Then the defendant says that the rights claimed could only be enjoyed in respect of ancient tenements, and he does not admit that the plaintiffs’ alleged tenements are ancient. The interrogatories, which have been very usefully classified by Mr. Hastings for this purpose, ask four questions:

First, are the messuages of which the plaintiffs are in [* 806] *possession ancient messuages; secondly, are there any lands held with the houses of Nightingale (that I have

dealt with, and that is going to be answered); thirdly, are the tenements in question held of any manor; and fourthly, has there been any user by the plaintiffs or their predecessors in title of these alleged rights over the common?

Now it is obvious that the first, third, and fourth of those matters are matters which the plaintiffs may have to prove to support their case. The interrogatories do not ask, "By what evidence are you going to prove these facts?" but they do ask, "Are these things the fact or not?" Now, what is the materiality of it? The materiality, of course, to the defendant's case is only this, that if he can make out they are not the fact, he will be able to defeat the plaintiffs' case,—that is to say, if he can show from the plaintiffs' admission that the plaintiffs cannot prove these facts as to which he interrogates them, then the plaintiffs will not be able to make out their case. But is that legitimate? It is directly against the rule which I have been citing from Vice-Chancellor Wigram's book. It is not asking discovery in respect of any substantive case of the defendant, but it is asking discovery from the plaintiffs as to the facts on which the plaintiffs must rely to make out their own case; and that, according to the rule laid down in all the cases which I have referred to, is clearly beyond the limit to which a man can go. It is like looking into the brief. It is like asking: "Now, tell me what are you going to prove at the hearing; I am not asking for your evidence, but I will ask what you are going to prove." Let us put the question thus. Take for example the case of user. User or non-user has no materiality in this action at all, except as a mode by which the plaintiffs will attempt to make out the right they assert. We know very well that that is the usual manner in which these rights are proved. They may at the trial produce a number of witnesses to show that they and their predecessors in title have always, or have again and again from a time long past, used these rights of common or estovers and whatever else is claimed in respect of these particular tenements. That of course one can guess is probably the line which the evidence will take. Suppose the question had been in this form, "Have you any, and what, evidence to prove acts of user?" it is obvious that no such question as that could be asked. Then leave out the words "and what" — "Have you any evidence to prove acts of user?" Could that question be put? To my mind, clearly not. They have clearly no right to know whether

they have the evidence, any more than to know what the evidence is. Then alter the form of the question again, "Have you or your predecessors in title ever used?" That is only another way of asking what the evidence is; and I refer to the authority which I have cited, and which has the approval of Vice-Chancellor Wigram — the authority of *Iry v. Kekewich* — as showing that that is precisely what he cannot ask.

The question was, "On what facts do you rely? Set out the births, deaths, marriages, and so on, which are the different steps of your pedigree." The Court held you could not ask a question of that kind at all; that is the mode in which they will make out their case. You have no right to know how they will make out their case. Of course you cannot ask how it is going to be proved; but, further, you cannot ask the fact. It will not do to come here and say, Now I will not ask you by what evidence you can prove the fact, but I will ask you is it a fact or not,—that is, can you prove it or not? To my mind that is not admissible. I do not want to rest my decision in this case on a particular part or word of the interrogatory. It has been very fairly indeed put as a question of principle, and the interrogatories have been classified in the particular way which I have mentioned.

Another question is, "Are these tenements held of any manor?" That would be a matter important to the plaintiffs' case to prove. How has the defendant a right to come and say, "You cannot prove that these tenements are held as part of any manor, and therefore your case will fail?" That is a matter which, again, is part of the plaintiffs' evidence, which before the trial the defendant has no right to demand from the plaintiffs. Take again [* 807] the *question: "Are these messuages ancient messuages?"

If they cannot prove that they are they very likely will fail at the trial, but that question is a part of their case. None of these questions are questions of any substantive case set up by the defendant of confession or avoidance of the plaintiffs' case; and they are not relevant to the defendant's case except as a direct negative of the plaintiffs' case. Therefore they are questions seeking to find out what will be in the plaintiffs' brief at the trial, what sort of evidence they are going to produce, how they are going to make out their case; and for that reason it seems to me they are altogether wrong, and I must disallow the summons, except of course as to the question which Mr. Kekewich admits must be answered.

Kekewich. How will your Lordship deal with the costs? The old rule was that the costs were distributed if you succeeded in respect of one and failed as to the others.

KAY, J. I think you had better observe that rule here and distribute the costs. You must pay the costs of the summons as far as it relates to that which you have to answer, and they will pay the costs of the rest, and there must be a set-off.

The defendant Bridges appealed.

Hastings, Q. C., and Kingdon, for the appellant, cited *Lyell v. Kennedy*, 53 L. J. Ch. 449, 9 App. Cas. 81 (p. 513, *ante*), *Earl De la Warr v. Miles*, 50 L. J. Ch. 754, 17 Ch. D. 535, 595, *Flight v. Robinson*, 8 Beav. 22, 13 L. J. Ch. 425, *Grumbrecht v. Parry*, 32 W. R. 203, 558; *Hoffman v. Postill*, *Eade v. Jacobs*, *Wigram on Discovery*, p. 66, *The Attorney-General v. Gaskill*, *The Commissioners of Sewers of the City of London v. Glasse*, and *Saunders v. Jones*, 47 L. J. Ch. 440, 7 Ch. D. 435.

Kekewich, Q. C., and P. H. Lawrence, for the respondents.

In the course of the argument for the respondents, the Court intimated that some further part of the interrogatories ought to be answered by the plaintiffs, and suggested an arrangement between the counsel as to what parts ought to be answered. It was thereupon agreed that the Court should act as arbitrators, and settle the interrogatories in the form in which they ought to be answered. The Court did so.

BAGGALLAY, L. J. Counsel in this case have, I think, with great discretion, and certainly to our great relief, placed the Court in the position of arbitrators, and we have endeavoured in what we have done to bear in mind the several authorities which have been cited to us. We think that the interrogatories were too wide; but on the other hand we think that some of them ought to be answered, and we think they should be in the form I shall presently mention. Having regard to the modifications made in the interrogatories, I think the costs here and below should be costs in the action.

His Lordship then read the interrogatories settled by the Court, as follows:—

1. How long have you, George Parker Bidder and William Henry Nightingale, been respectively proprietors or occupiers of the lands and premises respectively called in your statement of claim Ravensbury, The Fountain Beerhouse, and the three cottages,

and for what estates or interests, and what is the tenure thereof respectively? Are such respective premises, or were they, or any and which of them, at any time heretofore, and when last, held, held of, or situate within the limits of any, and what, actual or reputed manors or manor? Set forth which of the manors of Mitcham, Ravensbury, Biggin, and Tamworth, or Vauxhall extend, as you allege, over any, and what, parts or part of the land described in your statement of claim as Beddington Corner, and which is in fact Wallington Common, but is hereinafter referred to as Beddington Corner. Are any, and which, of the messuages held by you respectively ancient messuages, or how otherwise, and when were the same respectively built? Have the said "Fountain" and three cottages respectively any, and what, lands appurtenant thereto and held therewith?

[* 808] *2. Have you, George P. Bidder and William Henry Nightingale, respectively, as proprietors or occupiers of any, and what, land or tenements in the parish of Mitcham, ever placed, kept, or depastured any, and what, kind of commonable beasts, or any other, and what, animals in or upon, or cut or taken furze or gorse upon or from, or dug or taken gravel, sand, or other materials upon or from, or taken part in any, and what, games or sports in or upon either, any and what, parts or part in particular of Mitcham Common (but not including Beddington Corner therein), or in or upon any, and what, part or parts in particular of Beddington Corner respectively?

3. If yea, set forth the instances with dates, and whenever the same were by any, and what, licence, or in consideration of any, and what, payment, and how and for what purposes you or they respectively applied any such gorse, furze, or other materials.

ENGLISH NOTES.

As to the right to production of title-deeds generally see also Nos. 17 & 18 of "Deed" and notes, 8 R. C. 712-728.

While in Chancery a party had always extensive powers of enforcing discovery, at Common Law he had originally only certain restricted rights of obtaining inspection of documents.

Under 14 & 15 Vict. c. 99, and 17 & 18 Vict. c. 125 (The Common Law Procedure Act, 1854), the Common Law Courts acquired a large jurisdiction as to discovery, differing however from that which existed in Chancery.

The practice in all the Divisions of the High Court of Justice is

Nos. 1, 2. — *Lyell v. Kennedy*; *Bidder v. Bridges*.— Notes.

now regulated mainly by the Judicature Acts, and the Orders and Rules thereunder.

These Acts “make an alteration of procedure merely, and not an alteration of the law.” *Per* JESSEL, M. R., in *Lyell v. Kennedy* (1882), 20 Ch. D., at p. 489, and see also *Hemmings v. Williamson* (1883), 10 Q. B. D. 459.

Where no other provision is made by the Acts or rules, the former procedure and practice remains in force. Ord. 72, r. 2; *Wilson v. Church* (1878), 9 Ch. D. 552, 39 L. T. 413, 26 W. R. 735.

Where the practice in Chancery conflicts with that at Common Law the former is to prevail. Judicature Act, 1873, s. 25, subs. 11; *Bustros v. White* (1876), 1 Q. B. D. 423, 426, 45 L. J. Q. B. 642, 34 L. T. 835, 24 W. R. 721; *Blockow v. Fisher* (1882), 10 Q. B. D. 161, 166, 52 L. J. Q. B. 12, 47 L. T. 724, 31 W. R. 235; *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644, 45 L. J. Ch. 449, 35 L. T. 76, 24 W. R. 624.

A party is entitled to discovery of his adversaries' case or of the material facts upon which that case depends. *Attorney-General v. Gaskill* (1882), 20 Ch. D. 519, 51 L. J. Ch. 870, 46 L. T. 180, 30 W. R. 558; *Marriott v. Chamberlain* (1886), 17 Q. B. D. 154, 55 L. J. Q. B. 448, 54 L. T. 714, 34 W. R. 783; *Blockow v. Fisher* (*supra*).

But he is not entitled to a knowledge of the evidence by which his opponent intends to prove his case. *Bidder v. Bridges* (principal case No. 2, *supra*); *Benbow v. Low* (1880), 16 Ch. D. 93, 50 L. J. Ch. 35, 44 L. T. 119, 29 W. R. 265, and many older authorities, for example, *Plummer v. May* (1750), 1 Ves. 426; *Bligh v. Benson* (1819), 7 Price, 205, at p. 207.

A party is sometimes required to disclose information in the nature of particulars. For example, where the defendant in an action for wrongful dismissal alleged acts of misconduct against the plaintiff, it was held that he must specify such acts. *Saunders v. Jones* (1877), 7 Ch. D. 435, 47 L. J. Ch. 440, 37 L. T. 769, 26 W. R. 226. A plaintiff was held bound to state his grounds for alleging that a certain mine was worthless, and to set out particularly certain papers by which he alleged that he had been induced to take shares therein. *Ashley v. Taylor* (1878), 38 L. T. 44. In an action for dissolution of partnership, the plaintiff, having alleged improper conduct on the part of the defendant, was held bound to set forth the particulars and circumstances of such conduct. *Lyon v. Tweddell* (1879), 13 Ch. D. 375. In an action for libels contained in a newspaper and pamphlet the defendants were required to answer as to the extent of the circulation of these publications. *Parnell v. Walter* (1890), 24 Q. B. D. 441, 59 L. J. Q. B. 125, 62 L. T. 75, 38 W. R. 270.

Where the licensee under a patent was sued for an account and

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royalties, of which patent the defendant denied user and alleged that the process was a secret of his own, it was held that the defendant must answer fully detailed questions as to his process, so long as he did not disclose his secret, and must also answer an inquiry as to the names of some of his customers. *Ashworth v. Roberts* (July 19, 1890), 45 Ch. D. 623, 60 L. J. Ch. 27, 63 L. T. 160, 39 W. R. 170. But in an action to restrain defendants from selling their goods as those of the plaintiffs', an interrogatory requiring the plaintiffs to set forth the quantities of goods sold by them, distinguishing the quantities sold in each year, was disallowed as being directed to details of the plaintiffs' evidence. *Benbow v. Low* (1880), 16 Ch. D. 93, 50 L. J. Ch. 35, 44 L. T. 119, 29 W. R. 265. As to particulars of infringement of a patent, see *Moseley v. Victoria Rubber Co.* (1886), 55 L. T. 482. In an action for diminishing the water in a river, the plaintiffs, being asked to give a list of the days between certain dates on which they had been injured by the withdrawal of the water, were held entitled to answer that they were unable to specify the days. *Rasbotham v. Shropshire Union Railway & Canal Co.* (1883), 24 Ch. D. 110, 48 L. T. 902, 32 W. R. 117. And where the defendant in a libel action was asked whether she had written a letter containing the alleged libellous statements, and replied that to the best of her recollection she never wrote those statements, that she had no copy of the letter, and could not recollect the exact statements therein, it was held that her answer was sufficient. *Dalrymple v. Leslie* (1881), 8 Q. B. D. 5, 51 L. J. Q. B. 61, 45 L. T. 478, 30 W. R. 105.

Where the name or address of a person is material it must be disclosed. Thus in an action for libel in respect of a statement by the defendant that the plaintiff had fabricated a story to the effect that he had seen a copy of a circular, which he alleged had been sent out by the defendant, in the hands of a certain person; that copies of it were in the possession of other persons; and that his informant was a solicitor: the plaintiff was held bound to discover the names and addresses of these persons as being material to the plea of justification. *Marriott v. Chamberlain* (1886), 17 Q. B. D. 154, 55 L. J. Q. B. 448, 54 L. T. 714, 34 W. R. 783. In an action to restrain infringement of a trade-mark, the defendant was held entitled to discovery of the names of "divers persons" alleged in the statement of claim to have been induced to purchase the defendant's goods as the plaintiffs'. *Humphries v. Taylor* (1888), 39 Ch. D. 693, 59 L. T. 177, 37 W. R. 192. In a patent action it was held that the defendant must disclose the names and addresses of the persons by whom prior user was alleged to have been made. *Birch v. Mather* (1883), 22 Ch. D. 629, 52 L. J. Ch. 292, 31 W. R. 362. Where the plaintiff claimed for work and labour in

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making a model windlass the defendant was required to give the names of judges who had awarded it a prize at an exhibition. *Hall v. Liardet* (1883), W. N. (1883) 175. And see *Ashworth v. Roberts* (1890), *supra*.

On the other hand interrogatories were disallowed as to the persons in whose presence an alleged verbal consent to a breach of contract was given, *Eade v. Jacobs* (1877), 3 Ex. D. 335, 47 L. J. Ex. 74, 37 L. T. 621, 26 W. R. 159; and as to the persons in whose presence one of the parties was alleged to have misconducted himself. *Lyon v. Tweddell* (1879), 13 Ch. D. 375; *Johas v. James* (1879), 13 Ch. D. 370. In an action for libel contained in a private letter, the plaintiff cannot interrogate the defendant as to the persons from whom he received the information contained in the letter. *Mackenzie v. Steinkoff* (1890), 54 Justice of the Peace, 327. And generally it may be said that the names of a party's witnesses need not be disclosed unless they happen to be material facts. *Marriott v. Chamberlain* (*supra*).

Where a conversation happens to be material to the issue, a party may be required to state the substance of it. *Eade v. Jacobs* (1877), 3 Ex. D. 335, 47 L. J. Ex. 74, 37 L. T. 621, 26 W. R. 159.

Where the question is whether a party has a title to land, he must disclose his alleged title. *Bidder v. Bridges* (principal case No. 2 *supra*); *Cagley v. Sandycroft Brick, &c. Co.* (1885), 33 W. R. 577. But a party whose case is not that he has a title, but that the opposite party has none, cannot be questioned as to his title. *Eyre v. Rodgers* (1891), 40 W. R. 137; *Cromwell v. Swail* (1885), 1 Times Rep. 474; *Lyell v. Kennedy* (principal case No. 1, *supra*).

The rule is the same as regards production of documents; a party will not be compelled to disclose those which evidence exclusively his own case. See *Budden v. Wilkinson* (July 14, 1893), 1893, 2 Q. B. 432, 63 L. J. Q. B. 32, 69 L. T. 427, 41 W. R. 657; *Bewicke v. Graham* (1881), 7 Q. B. D. 400, 50 L. J. Q. B. 396, 44 L. T. 371, 29 W. R. 436. He must, however, swear that they evidence his own case and do not support that of his opponent or impeach his own. That assertion will be accepted as sufficient, unless the Court is reasonably certain that the defendant has erroneously represented or misconceived the nature of such documents. See in support of both these statements, *Attorney General v. Emmerson* (1882), 10 Q. B. D. 191, 52 L. J. Q. B. 67, 48 L. T. 18, 31 W. R. 191; *Leslie v. Cave* (1887), 56 L. T. 332; *Hey v. De la Hey* (1886) W. N. (1886) 101.

The right to discovery is not restricted to the facts directly in issue, but extends to facts relevant thereto. See, as to interrogatories, per *ESHER*, M. R., in *Marriott v. Chamberlain*, *supra*, and, as to production of documents Ord. 31, r. 12, providing that a party may apply for an

order directing another party to the cause to discover documents "relating to any matter in question therein," and r. 14 empowering the Court to order production of such documents at any time during the pendency of the cause.

But it is essential that the discovery sought for be relevant to the facts in issue. *Kennedy v. Dodson* (Jan. 17, 1895) 1895, 1 Ch. 334, 64 L. J. Ch. 257, 72 L. T. 172, 43 W. R. 259; also *In re Leigh, Rowcliffé v. Leigh* (1877), 6 Ch.D. 256, 37 L. T. 557, 25 W. R. 783; *Sheward v. Lonsdale* (1879), 5 C. P. D. 47, 28 W. R. 324, affirmed 42 L. T. 172; *Blockow v. Young* (1880), 42 L. T. 690; *Mansfield v. Childerhouse* (1876), 4 Ch.D. 82, 46 L. J. Ch. 30, 35 L. T. 590, 25 W. R. 68; *Smith v. Berg* (1877), 36 L. T. 471, 25 W. R. 606; *Meek v. Witherington* (1893), 67 L. T. 122.

In a libel action the plaintiff, in order to prove that the defendant was the writer of the letter complained of, may interrogate him as to whether or not he was the writer of another letter addressed to a third person, the question being relevant, inasmuch as it leads up to a matter in issue in the cause. *Jones v. Richards* (1885), 15 Q. B. D. 439. In a similar action against the proprietor of a newspaper where the defendant admitted the publication of the words, the plaintiff was held not entitled to interrogate as to the name of their writer, unless the identity of such writer was a fact material to some issue in the case. *Gibson v. Eans* (1889), 23 Q. B. D. 384, 58 L. J. Q. B. 612, 61 L. T. 388. In an action for libels contained in a newspaper and pamphlet to the effect that the plaintiff was the author of certain discreditable letters, the only defence being that a sum of 40/ paid into Court by the defendant was enough to satisfy the plaintiff's claim, it was held that interrogatories as to the names of the persons from whom the letters were obtained, what was paid for them, and what steps taken to test the information supplied to the defendants, were not sufficiently relevant or material, but that others as to the extent of the circulation of the newspaper and pamphlet were relevant. *Parnell v. Walter* (January 11, 1890), 21 Q. B. D. 441, 59 L. J. Q. B. 125, 62 L. T. 75, 38 W. R. 270.

In an action by bailors against bailees, interrogatories by the defendant with a view to showing *jus tertii* were held irrelevant. *Rogers v. Lambert* (February 10, 1890), 24 Q. B. D. 573, 59 L. J. Q. B. 259, 62 L. T. 694, 38 W. R. 542.

Interrogatories by the plaintiff in a suit to revoke probate, as to alleged gifts by a testator to the defendant, with a view to making out a case of undue influence, were allowed. *In re Holloway, Young v. Holloway* (1887), 12 P. D. 167, 56 L. J. P. 81, 57 L. T. 515, 35 W. R. 751. In an action against an executor to recover from the testator's estate moneys paid to the testator, in alleged improper exercise of a power,

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more than twenty years before action, the executor need not make inquiry of the solicitor or banker to his testator respecting the dealings of the testator with the moneys, if the inquiry will not obviously result in obtaining information with respect to which the executor is interrogated. *Alliott v. Smith* (1895), 1895, 2 Ch. 111, 64 L. J. Ch. 684, 72 L. T. 789, 43 W. R. 597.

Questions which go merely to the credit of a witness and might be put in cross-examination are irrelevant. *Kennedy v. Dodson* (January 17, 1895), 1895, 1 Ch. 334, 64 L. J. Ch. 257, 72 L. T. 172, 43 W. R. 259; *Allhausen v. Labouchere* (1877), 3 Q. B. D. 654, 47 L. J. Q. B. 819, 39 L. T. 207, 27 W. R. 12.

Interrogatories as to the amount of damages are relevant, though they may not be allowed until the question in the action has been tried. *Fennessey v. Clark* (1887), 37 Ch. D. 184, 57 L. J. Ch. 398, 58 L. T. 289; *Marriott v. Chamberlain* (1886), 17 Q. B. D. 154, 55 L. J. Q. B. 448, 54 L. T. 714, 34 W. R. 783. From *Clarke v. Bennett* (1884), 32 W. R. 550, however, it would seem that they are only admissible where the defendant does not directly traverse the plaintiff's claim, but has either paid money into Court or can show that the damages claimed are *prima facie* extortionate.

A party has a right to exhibit interrogatories for the purpose of obtaining from the opposite party an admission which will make it unnecessary for him to enter into evidence of the facts admitted. *Attorney General v. Gaskill* (1882), 20 Ch. D. 519, 51 L. J. Ch. 870, 46 L. T. 180, 30 W. R. 558.

Ord. 31, r. 1 provides that interrogatories which do not relate to the matters in question in the cause are to be deemed irrelevant notwithstanding that they might be admissible in cross-examination. It has been held that an interrogatory asking in substance whether the defendant had not been in such a position that he must know whether the allegations in the statement of claim were true or false, does not relate to any matter in question in the cause within the meaning of this rule. *In re Morgan, Owen v. Morgan* (1888), 39 Ch. D. 316, 60 L. T. 71, 37 W. R. 243.

Interrogatories should not be scandalous. They are not scandalous, though they tend to criminate the party interrogated, if they are material to the case of the party interrogating. *Fisher v. Owen* (1878), 8 Ch. D. 645, 47 L. J. Ch. 681, 38 L. T. 577, 26 W. R. 581.

In actions for the recovery of land there never was any doubt that a party claiming by an equitable title was entitled to the same discovery as in other actions. An erroneous opinion had, however, gained ground that a party relying upon a legal title was not entitled to such discovery. The argument of (one regrets to say) *the late* Mr. MacClymont in *Lyell*

v. Kennedy (the principal case No. 1) of which the judgment of the learned lords are mainly an echo, will long be remembered as one which for acuteness and research may be matched with the classic speeches of Sugden. It not only cut the ground from under the judgments of the MASTER OF THE ROLLS and the other Judges of the Court of Appeal, but it effectually destroyed the belief or prejudice as to the sacred rights of a defendant in possession of land which was at that time generally shared by members of the legal profession. It is to be noted, however, that the Court will still exercise special care that such a defendant be not harassed by vague and fishing applications for discovery. See *Philipps v. Philipps* (1878), 4 Q. B. D. 127, 48 L. J. Q. B. 135, 39 L. T. 556, 27 W. R. 436.

If the Court is satisfied that the right to discovery depends upon the determination of some question in dispute in the cause, it may order that such question be determined first. Ord. 31, r. 20. Thus in an action claiming an account of profits made by the defendants as agents of the plaintiffs, where the defendants denied the agency, the Court declined to order production of the invoices of goods sold by third parties to the defendants and resold by them to the plaintiffs until after the trial of the question of agency. *Ferminck v. Edwards* (1880), 29 W. R. 189. See also *Fennessey v. Clark*, *supra*: *Parker v. Wells* (1881), 18 Ch.D. 477, 45 L. T. 517, 30 W. R. 392.

But in an action for misapplying the interest of trust moneys, it was held that the defendant must answer as to the amount of interest that he had received, as it would enable the Court to make an immediate decree for payment if the plaintiff established the trust. *In re Morgan, Owen v. Morgan* (1888), 39 Ch.D. 311, 60 L. T. 71, 37 W. R. 243. And in a suit for infringement of a patent, discovery of the defendant's processes ought not to be postponed under the above rule until the validity of the patent has been established. *Benno Jaffé Lanolin Fabrik v. Richardson* (1893), 62 L. J. Ch. 710, 68 L. T. 404, 41 W. R. 534.

By rule 6 of Order 31 any objection to answering interrogatories on the ground that they are scandalous or irrelevant or not *bonâ fide* for the purpose of the cause or matter, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

By rule 7 any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary, or scandalous. It has been held that this rule deals with two cases, viz. (1) where the interrogatories are in themselves unobjectionable, but by reason of the circumstances of the case it would be unreasonable or vexatious to call upon the party to answer; (2) where the interrogatories are in themselves

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objectionable by reason of being prolix, oppressive, unnecessary, or scandalous. In the first case all or any of the interrogatories may be set aside by a judge's order; in the second all or any may be struck out. *Oppenheim v. Sheffield* (1892), 1893, 1 Q. B. 5, 62 L. J. Q. B. 167, 67 L. T. 606, 41 W. R. 65. When a party objects to answer on any of the grounds mentioned in the rule, he may apply for an order and cannot be required to take his objection in his affidavit in answer. *Ib.* The fact that leave has been obtained to administer interrogatories is not a bar to an application under either part of the rule. *Ib.* If the judge considers a set of interrogatories to be as a whole prolix, oppressive, or unnecessary, he has power to strike them all out, though some of them may be unobjectionable.

By rule 13 of the Order, an affidavit to be made by a party against whom an order for production of documents (under r. 12) has been made, shall specify which, if any, of the documents therein mentioned he objects to produce.

AMERICAN NOTES.

The remedy of Discovery by Bill is nearly obsolete in this country. The matter of Discovery and Production of Documents is regulated by statute in the great majority of the United States. A reference to these may be found in 2 Am. & Eng. Cyc. of Law, pp. 207, 208. Under the Codes, Discovery is effected by order of Court instead of bill.

Both principal cases are cited in 1 Pomeroy's Equity Jurisprudence, pp. 248, 252. This excellent author thus states the rule in question: "The fundamental rule on this subject is, that the plaintiff's right to a discovery does not extend to all facts which may be material to the issue, but is confined to facts which are material to *his own title or cause of action*: it does not enable him to pry into the defendant's case, or find out the evidence by which that case will be supported. The plaintiff is entitled to a disclosure of the defendant's title, and to know what his defence is, but not to a statement of the evidence on which the defendant relies to support it." Citing *Hoppock's Ex'rs. v. United, &c. R. Co.*, 27 New Jersey Equity, 286; *French v. Rainey*, 2 Tennessee Chancery, 641; *Richardson v. Mattison*, 5 Bissell (U. S. Circ. Ct.), 31; *Kearny v. Jeffries*, 48 Mississippi, 343; *Heath v. Erie R. Co.*, 9 Blatchford (U. S. Circ. Ct.), 316; *Cullison v. Bosson*, 1 Maryland Chancery, 95; *Phillips v. Precoat*, 4 Johnson Chancery (New York), 205; *King v. Ray*, 11 Paige (New York Chancery), 235; *Brooks v. Byam*, 1 Story (U. S. Circ. Ct.), 296-301 (Story, J.); *Haskell v. Haskell*, 3 Cushing (Mass.), 540; *Bethell v. Casson*, 1 Heming & Miller, 806. See *Strong v. Strong*, 1 Abbott Practice Rep. (N. S.) 233; *Bellows v. Stone*, 18 New Hampshire, 465. Story lays down the same rule (Equity Pleading, sect. 572).

Lyell v. Kennedy is cited in a very recent work, Merwin on Equity Pleading, sect. 854, citing also *Peck v. Ashley*, 12 Metcalf (Mass.), 478.

The rule that discovery as to the defendant's case will not be granted does

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not prevail in Massachusetts, and a bill for discovery solely as to the defendant's title is there upheld, "without impugning the English rule." *Adams v. Porter*, 1 Cushing, 170; *Haskell v. Haskell*, 3 *ibid.* 540. The Court however claim that the Statutes warrant a broader construction than the English doctrine furnishes.

In New York it is held that the Court may compel a discovery of the defendant's documentary evidence. *Seligman v. Real Estate Trust Co.*, 20 Abbott's New Cases, 210. This is founded on *Powers v. Elmendorf*, 4 Howard Practice Rep. 60, where it was deemed that the omission from the Code of Procedure of the former statutory provision restricting discovery to cases within the principles and practice of the Court of Chancery indicated an intention to extend the power to the discovery of the defendant's evidence; and the Court observed: "The power thus conferred upon the Court is, in my judgment, better adapted to attain the ends of justice than the more restricted power it before possessed. I can see no good reason why a party should be permitted to withhold from the knowledge of his adversary documentary evidence affecting the merits of the controversy, only to surprise him by its production at the trial. Unless for some satisfactory reason to be made apparent to the Court, each party ought to be required, when it is desired, to disclose to the other any books, papers, and documents within his power which may contain evidence pertinent to the issue to be tried. If the evidence thus disclosed should be conclusive upon the issue, the parties may be saved the expense of a trial, — and if not, they will come to the trial upon equal terms, each prepared, so far as the evidence within his reach will enable him to do so, to maintain his side of the controversy. This I believe to have been the intention of the Legislature, and this I regard as the true construction of their enactment on this subject."

The general rules of Discovery are well stated in *Price v. Tyson*, 3 Bland Chancery (Maryland), 392; 22 Am. Dec. 279; *Skinner v. Judson*, 8 Connecticut, 528; 21 Am. Dec. 691.

The effect of the Statutes permitting parties to be witnesses upon the right to Discovery is discussed in note, 55 Am. Dec. 79. Tennessee, Alabama, West Virginia, and Mississippi holding that the right still exists, and Missouri, Iowa, Pennsylvania, South Carolina, and Michigan the contrary. See Merwin on Equity Pleading, sect. 857.

The remedy was applied recently in respect to lost written instruments. *Lancy v. Randlett*, 80 Maine, 169; 6 Am. St. Rep. 169; and to production of documents, in *Arnold v. Pawtuxet V. W. Co.*, 18 Rhode Island, 189; 19 Lawyers' Rep. Annotated, 602; *Post v. Toledo, &c. R. Co.*, 144 Massachusetts, 341; 59 Am. Rep. 86.

No. 3. — **Re Emma Jane Hinchliffe (a lunatic)**, 64 L. J. Ch. 76. — Rule.

No. 3. — **RE EMMA JANE HINCHLIFFE (A LUNATIC).**
(1894.)

RULE.

ANY person entitled to inspect and take copies of an affidavit has a similar right as to the exhibits referred to in it.

Re Emma Jane Hinchliffe (a lunatic).

64 L. J. Ch. 76-79 (s. c. 1895, 1 Ch. 117; 71 L. T. 532; 43 W. R. 82).

Discovery. — Affidavit. — Exhibit.

The committee of a lunatic obtained an order giving her liberty to [76] make the lunatic a co-plaintiff with herself in an action. The order was based on an affidavit by the committee, which exhibited a case for the opinion of counsel and his opinion thereon. The affidavit was filed, but the exhibits were retained by the committee. The lunatic died before the action was decided, and her executor desired to have all documents affecting her handed over to him, and also to have inspection of the exhibits: — *Held*, that any person entitled to see an affidavit was entitled to see exhibits referred to therein; that the rights of the lunatic had been affected by the affidavit, and the committee must produce the exhibits for inspection: but that the committee was entitled to retain documents in the nature of vouchers until she was discharged.

Motion.

Emma Jane Hinchliffe was a person of unsound mind, and her sister, Mrs. Fereday, was her committee. Mrs. Hinchliffe was entitled under the will of her father, James Roberts, to one-fifth of certain property, and Mrs. Fereday and another sister were entitled to other two-fifths. Mrs. Fereday desired to commence proceeding for the administration of the trusts of the will, and on the 21st of January, 1891, she, as committee, obtained leave to make Mrs. Hinchliffe a co-plaintiff. This application was supported by an affidavit made by Mrs. Fereday which exhibited a case laid before counsel and his opinion thereon, and referred to them as annexed thereto. The affidavits were filed in due course, but the exhibits, according to what was stated to be the present practice, were retained by the committee. The writ in the action *Fereday v. Jesson* was issued on the 26th of January, 1891. Mrs. Hinchliffe was made one of the original plaintiffs, the other two being her sisters, and the trustee of the will was defendant.

The lunatic died in 1893, leaving a will by which she appointed Mr. Edward Roberts Smith her executor, and he was added as a defendant to the action by an order of the 15th of February, 1894. It was stated in the evidence that he was a brother of the defendant and disapproved of the action.

On the 6th of April, 1894, an order was made by the Master, on the application of the executor, for the delivery of the lunatic's papers, and that, on the committee undertaking to give them up, a sum of £250 stock, part of the lunatic's estate, should remain in Court to answer any claim against her in respect of the costs of the action.

The lunatic's papers, including a copy of the affidavit, were accordingly delivered up to Mr. Smith, with the exception of certain transcripts of accounts, copies of various affidavits, office copies of accounts, and other documents which the committee claimed to keep as her vouchers for the payment she had made. She declined to hand over the exhibits used on the application to make the lunatic a co-plaintiff.

At the trial of the action on the 30th of November, 1892, certain allegations against the defendant were withdrawn, and all costs were reserved. The defendant threatened to ask for an order that the plaintiffs should pay the whole of the costs, or at least those caused by these allegations. Mr. Smith desired to have the lunatic's estate freed from all liability in respect of the action, and he also proposed to impeach the committee's account. He took out a summons on the 29th of June, 1894, asking that Mrs. Fereday might be ordered to give him inspection of the exhibits and to produce the other documents in dispute.

On the 25th of July Master Bulwer, and on the 9th of August KAY, L. J., in chambers, refused to make the order. Mr. [* 77] Smith then obtained special leave to apply * to the Court by way of appeal for an order that the committee should, within seven days from the date of such order, produce on oath to him, or to his solicitors, the case for the opinion of counsel and the opinion thereon exhibited to her affidavit, and that he or his solicitors might be at liberty to take extracts from or copies of the said case and opinion, and that the committee might be ordered to deliver up on oath to him all papers and documents in any way relating to the estate of Emma Jane Hinchliffe, or to the dealings of the committee therewith, or to her management thereof as such

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committee, and that she might be ordered to pay the cost of the application.

H. Terrell, for the executor. — We are entitled to inspection of the exhibits. They form parts of affidavits filed on behalf of the lunatic as well as on behalf of the committee. At all events, the lunatic's rights have been affected by them. She has become liable for the costs of the action, and we want to get rid of that liability. We also ask for production of the other documents. The Court has jurisdiction to make such an order, and could do so even after the discharge of the committee. *In re Ferrior*, 37 L. J. Ch. 569; L. R., 3 Ch. 175, and *In re Smyth (a lunatic)*, 15 Ch. D. 286.

Willis Bund, for the committee. — The case and opinion of counsel relate solely to my title, and I am not bound to produce them. *Webster v. Whewall*, 49 L. J. Ch. 704; 15 Ch. D. 120. If this were a question arising in the action they might have a right to inspect them. But if they applied in the action for inspection, it would be held that these exhibits were privileged. The applicant is himself a defendant. He was made a defendant because he refused to continue the action. Now he is trying to do in lunacy what he could not do in the action. If the lunatic herself had become sane after the commencement of the action she could only have seen these exhibits if she had been willing to continue the proceedings. She would not have been entitled to inspect them simply in order to defeat the action. The application to join her as a plaintiff was not made in the action; it was an *ex parte* application in lunacy. She could not have seen these documents if the Master had acted on them without any affidavit.

[THE LORD CHANCELLOR (LORD HERSCHELL). I am not sure of that; the order affects her rights materially. But you have chosen to bring these documents before the Court. You made an affidavit referring to them for the purposes of your own rights, but you used it to affect another person's rights. The Court has acted on them, and any person affected must have a right to see them as against the person who filed them.]

The Court was acting for her, and she cannot repudiate what it has done. Therefore she cannot see the grounds on which it acted. These are my own documents, not hers. Further, I contend that the lunacy has come to an end, and there is no jurisdiction in the Court to make an order in lunacy for the inspection of private documents.

[SMITH, L. J., referred to Rules of the Supreme Court, Order XXXI., rule 15.]

The other documents will be essential to my case if the executor seeks to impeach my accounts. At all events, I am entitled to keep them till I am finally discharged.

H. Terrel, in reply.

THE LORD CHANCELLOR (LORD HERSCHELL). This is an application in the lunacy of Emma Jane Hinchliffe, who is now dead, for an order that her executor should have inspection of a case and opinion referred to in terms, to which I will allude presently, and made exhibits to an affidavit of her committee filed on the 6th of January, 1891. The committee was a sister of the lunatic, and there was also a third sister, who, like the committee, was sane. The committee and the sane sister entertained the view that the trustees of certain property in which they were interested together with the lunatic had dealt improperly in relation to it,

and they contemplated taking proceedings against those [*78] trustees. * They desired to join the lunatic as a plaintiff,

and they applied to the Court in the lunacy for an order to join her as a co-plaintiff with themselves. The joinder of the lunatic as a co-plaintiff in the action would obviously affect her rights, as it might subject her to liability for the costs of it. In order to obtain the consent of the Master to their application, the committee made an affidavit in which she said that she had taken the opinion of counsel, as she and her sisters were interested in the question of the liability of the trustees; and the affidavit states that the case and opinion "are annexed hereto, and marked with the" letters C and D respectively. On that affidavit the Master granted leave to join the lunatic as a plaintiff, and by so doing necessarily affected her rights. The lunatic is now dead, and this affidavit, being an affidavit in the lunacy, has been handed over by the committee to the executor of the lunatic. The executor, being in possession of the affidavit, sees that the Court was induced to make the order by the production of the documents annexed to the affidavit. He seeks production of those exhibits, and the committee resists that on the grounds that these documents were the property not of the lunatic, but of her committee, and Lord Justice KAY seems to have been of the same opinion. It is also suggested that the documents in question were privileged. I think that really the questions of property and privilege have nothing

No. 3. — Re Emma Jane Hinchliffe (a lunatic), 64 L. J. Ch. 78.

to do with this application. The documents may be the property of the committee, prepared and taken for her own satisfaction. It may be that, being her property, production of them could not have been ordered in the action. But she chooses to bring them before the Court herself as part of her affidavit, in order to make the Court act in a manner which may prejudice the lunatic's rights. I cannot, in the absence of authority, see any right on the part of the committee by which the lunatic if she had become sane, or her executor if she were dead, could be refused inspection of these documents, which form as much part of the affidavit as if they had been actually annexed to and filed with it. For these reasons I think it is impossible to hold that the committee is entitled to refuse inspection of these documents.

The other part of the application is that the committee should be ordered to hand over certain documents said to be the property of the lunatic. These documents consist of drafts and copy accounts. The committee has not yet received her final and absolute discharge. The executor avowedly desires to inspect the accounts with a view to impeaching the conduct of the committee. It may be that, when she is absolutely discharged, if the committee insists on retaining property of the lunatic which she has obtained as committee, the Court may have power to interfere as suggested by Lord Justice ROLT in *In re Ferrior*, but the time has not come for that, even if there is such a power in the Court. Therefore, I think no order ought to be made on the second part of the motion, and there ought to be no costs of the application.

LINDLEY, L. J. I agree. I think that the application for inspection of the case and the opinion of counsel said to be annexed to the affidavit does not turn upon questions of property or privilege. It is only a matter of convenience that exhibits are not lodged in the Master's office with the affidavit. In my opinion, any one who has a right to see an affidavit has also a right to see an exhibit referred to in the affidavit just as if it were annexed to the affidavit. That is all I need say on the first point. As to the second point, I do not think it is the general practice to make orders in lunacy to deliver up documents. The reason why parties produce them is that an action would lie against them if they did not. I do not say that the Court has no jurisdiction to make such orders, but that it is not usual. I agree that this part of the application is premature, and that there should be no costs.

 No. 4. — Elder v. Carter. — Rule.

SMITH, L. J. — It appears to me that when a person makes an affidavit and says that he refers to a document marked with the letter A, it is just the same as if he had copied it into the [*79] affidavit, and that * it is only made an exhibit to save expense. Therefore, any person entitled to see the affidavit is entitled to see the exhibit also. On the second point I have nothing to add.

ENGLISH NOTES.

In *Tebbut v. Ambler* (1839), 3 Jur. 435, 7 Dowl. P. C. 674, it was held that if a paper is used as an exhibit in connexion with an affidavit, but is not annexed thereto, the party against whom it is exhibited is entitled to have a copy in the same manner as if it were filed. But in the later case of *Deconport v. Jones* (1840), 8 Dowl. P. C. 497, 4 Jur. 720, the Court refused to compel a party who, in the course of an inquiry before the master, had made exhibits in connexion with an affidavit, to give copies of such exhibits to his opponent after the conclusion of the inquiry.

Parties are not bound to take office copies of exhibits. *Hawkyard or Hawks v. Stocks* (1845), 2 D. & L. 936, 9 Jur. 451.

Documents referred to in an affidavit and exhibited ought, according to strict practice, to be handed in with the affidavits and remain in Court until the matter in respect of which the affidavits are sworn has been disposed of. *Attenborough v. Clark* (1857), 2 H. & N. 588.

It may here be observed that documents specifically mentioned in answers to interrogatories are "documents referred to in an affidavit in the cause," within R. S. C. 1883, Ord. xxxi. r. 15, and must be produced for inspection without a further application for discovery or a further deposit of £5. *Moore v. Peachey* (1891) 1891, 2 Q. B. 707, 65 L. T. 750, 39 W. R. 592.

 No. 4. — ELDER v. CARTER, EX PARTE SLIDE AND SPUR
GOLD MINING COMPANY.

(C. A. 1890.)

RULE.

THE Court has no jurisdiction to order a person not a party to the proceedings to produce a document belonging to him, unless the parties to the proceedings are entitled to the production of the document for the purpose of justice at the moment the order is made; *e. g.*, for the purpose

No. 4. — Elder v. Carter, 25 Q. B. D. 194, 195.

of a pending trial, hearing, or application, or in order to carry out or complete an order which has already been obtained.

Elder v. Carter, Ex parte Slide and Spur Gold Mining Company.

25 Q. B. D. 194–202 (s. c. 59 L. J. Q. B. 281; 62 L. T. 516; 38 W. R. 612).

Production of Documents. — Persons not Parties.

Rule 7 of Order XXXVII., under which the Court has power in any [194] cause or matter “at any stage of the proceedings” to order the attendance of any person for the purpose of producing any documents which the Court may think fit to be produced, and which such person could be compelled to produce at the hearing or trial, was not made for the purpose of giving to litigants any new right to discovery against persons not parties to the proceedings, but in order to remove the difficulties which existed before the order was made, in compelling the production of documents by parties at any stage of the proceedings other than the hearing or trial.

The Court has no jurisdiction to order a person not a party to the proceedings to produce a document belonging to him, unless the parties to the proceedings are entitled to the production of such document for the purpose of justice at the moment the order is made; *e. g.*, for the purpose of a pending trial, hearing, or application, or in order to carry out or complete an order which has already been obtained.

Appeal from an order of the Divisional Court (HUDDLESTON, B., and GRANTHAM, J.), in an interpleader proceeding, directing the attendance of the Slide and Spur Gold Mining Company to produce certain books, writings, and documents.

The defendant, being a judgment creditor of one Haldeman, * obtained an order charging Haldeman's interest [* 195] in 375,000 shares in the company which were standing in the name of the plaintiff, but (as the defendant alleged) merely as trustee for Haldeman.

An interpleader issue was afterwards directed between the plaintiff and the defendant to determine Haldeman's interest in the shares in question. Before the trial of this issue the defendant took out a summons for an order directing the attendance of the company, “by their secretary or other proper officer, for the purpose of producing their books, writings, or other documents containing any entries relating either to registration, transfer, ownership, or other dealing with” the 375,000 shares, and “that the secretary or other officer of the said company be directed

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to attend before such persons at such time and place as may be ordered, and there to produce the said books, writings, and other documents for the inspection of " the defendant and his solicitors or agents, and to permit him or them to make copies of or extracts therefrom of the entries relating to the said shares; and asking also that the action might be stayed until such inspection should be had.

The company were the only respondents to this summons, and the discovery was sought for the general purposes of the interpleader issue, and not for the purpose of any summons or motion pending before the Court.

The summons for production was referred by the master to DENMAN, J., who referred it to the Divisional Court.

The hearing before the Divisional Court took place on April 18, 1890, when it was contended by counsel for the company that there was no jurisdiction to make an order for production of documents against persons not parties to the proceeding; but the Court considered the judgment of Lord COLERIDGE, C. J., in the *Central News Co. v. Eastern News Telegraph Co.*, 53 L. J. Q. B. 236, a decision that the Court had such jurisdiction, and that the suggestion of WATKIN WILLIAMS, J., in the same case, that Order XXXVII., r. 7, might be *ultra vires* if it purported to authorize an order for production against a stranger, was an *obiter dictum* by which they were not bound; and the Court accordingly [* 196] made an order * for production in the terms of the application. The company appealed.

C. Johnston Edwards, for the company. Order XXXVII., r. 7, does not confer upon litigants any new rights of discovery against strangers to the proceeding. The decision in *Warner v. Mosses*, 16 Ch. D. 100, 50 L. J. Ch. 28, which turned upon rule 4 of Order XXXVII., of the Rules of Court, 1875, virtually re-enacted by Order XXXVII., r. 5, of the orders now in force, shows that the rules are not to be construed as enlarging the jurisdiction of the Court.

Howard v. Beall, 23 Q. B. D. 1, 58 L. J. Q. B. 384, turned upon s. 7 of the Bankers' Books Evidence Act, and has no application. The right of discovery now claimed against the company is an entirely new one, and it is claimed not for the purpose of any particular pending motion, summons, or other proceeding, but for the general purposes of the interpleader issue. Lord COLERIDGE,

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C. J., in the *Central News Co. v. Eastern News Telegraph Co.*, in refusing to make an order under rule 7 before trial against persons not parties to the action, and where it was not required for the purposes of any particular motion or proceeding, said that any application for the exercise of the powers of this rule should be granted with the most watchful jealousy; and WATKIN WILLIAMS, J., suggested that if the rule did confer this power over perfect strangers it might be contended that it was *ultra vires*. Assuming that the application is warranted by rule 7 of Order XXXVII., the order itself is *ultra vires*. Before the Judicature Acts, under 1 Wm. IV. c. 22, s. 5, and the Common Law Procedure Act, 1854, ss. 46, 47, the Courts had no jurisdiction to compel production of documents as against persons not parties to the proceedings; and s. 17 of the Judicature Act of 1875 only authorizes the making of rules for "regulating the pleading, practice, and procedure" of the Courts, so that the rules made thereunder cannot enlarge or alter their jurisdiction. Then, again, the defendant either knows or does not know what material documents are in the possession of the company. If he does he can get production of them through a *subpoena duces tecum*; if he does not, he is attempting to get by a side-wind the means of manufacturing a case.

* [BOWEN, L. J. If the order is to be construed as [* 197] your opponent contends, I do not see the use of the Bankers' Books Evidence Act (42 & 43 Vict. c. 11, s. 7: see *Arnott v. Hayes*, 36 Ch. D. 731, 56 L. J. Ch. 844.)]

The order made is also objectionable in point of form, being a roving order which does not name or show upon the face of it what documents are to be produced.

[He also referred to *Straker v. Reynolds*, 22 Q. B. D. 262, 58 L. J. Q. B. 180, and *Rishdon v. White*, 5 Times L. R. 59.]

Vennell, for the defendant. The Court had jurisdiction to make the order. Rule 7 of Order XXXVII. is in the widest possible terms, and gives the Court power to order the attendance of any person to produce at any stage of the proceedings any document which the Court or a Judge may think fit to be produced. There is no limit to or qualification of the generality of the rule. It is clearly an extension of the powers of the Court, which, under the practice obtaining at the time the rule was made, could only order production of documents at the trial or hearing of a cause or matter; and in *Central News Co. v. Eastern News Telegraph Co.*,

while both the Judges carefully guarded themselves from saying that the Court had not the power to order production by a person not a party to the proceedings, Lord COLERIDGE, C. J., went further, and did not doubt "that the Court had power to make such an order."

The enactment in s. 7 of the Bankers' Books Evidence Act, 1879, was rendered necessary by the peculiar character of the business transacted by bankers, which requires the perpetual and almost momentary use of their books. This is not a case in which the persons required to produce the documents are strangers to the action. It is true that the company are not actually parties to it, but they are so interested in the interpleader that no injustice will be done them by the order.

Edwards was not heard in reply.

LINDLEY, L. J. The question is, whether this order can be supported. I confess that when it was first read it appeared to be one the like of which I had never seen or heard of; and [* 198] the * more the matter is reflected upon, the more difficult it is to support the order. Let us see exactly how the matter stands. This company is no party whatever to the interpleader issue. The company has no more to do with it — I do not say in point of fact, but in point of law — than I have, or any stranger has. One of the parties to the issue says: "Somebody has got some books which I should like to see for the purpose of enabling me to go into Court and try my case upon that issue. There is Order XXXVII., rule 7, which enables the Court, if it thinks fit, to order anybody to produce anything at any time, and I can apply to the Court and get an order to see those books. That, to my mind, is a very startling proposition. It is contrary to principle. Putting aside the facts of this particular case, the general proposition contended for is, that if any litigant thinks that documents held by anybody else who is not a party will be useful to him, and if the litigant wants to see them, he can get inspection of those documents from such person. That is entirely contrary to every rule relating to discovery which has ever existed, either on the common-law side or the equity side of the Court. It has long been a rule well established (the origin of it I do not recollect) that you cannot get discovery except from a party to your action. There is another rule, equally old and equally well-established, — that you cannot make a mere witness a party in

order to get discovery from him. That would be abusing the doctrine of production and discovery. This particular order has infringed both those rules. The inconvenience and danger of granting such an application as this must, I think, be apparent to anybody who considers it.

But then reliance is placed on Order XXXVII., r. 7. Now, on looking at that rule, wide as its language is, the rule does not say at what time or at what place, or for what purpose, this order is to be made, except for the purpose of producing documents. The rule is simple enough, and its history is this. There were difficulties in obtaining the attendance of witnesses and the production of documents at Common Law except on the trial of actions, and there were statutes passed to remove those difficulties — the statute 1 Wm. IV. c. 22, s. 5, passed in 1831, and the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), *ss. 46, 47; and when the rules had to be recast so [* 199] as to apply, not only to Common-Law actions, but to all actions — Chancery, and other actions — in the High Court, it became necessary to modify and change the words, so as to make them applicable to all proceedings in all Courts. That is the history of this rule, and there is no doubt whatever that it is a most useful rule; but the question is, whether we are to construe it as introducing a practice entirely unheard of before, and contrary, as I have endeavoured to show, to all principle, and all justice. Now, the answer to the defendant's argument is this, that you must look at this rule with reference to the purpose for which it was introduced; and it cannot be said that that purpose was to give a litigant a right to discovery which he did not previously possess against persons not parties to the action. That was not the purpose; so to construe it would be to abuse the rule. The object of it was to remove the difficulties which existed in compelling production of documents at various stages of the proceedings, both before and after the trial, at the hearing of motions, petitions, summonses, and examination of witnesses, and the like; and that is the real legitimate object of the rule, which is necessarily not confined to production on the hearing of any motion or petition, because there may be some proceeding before an official referee, or an examiner, or a commission to take evidence, to which this rule would apply, and I am not at all desirous of doing more than to say that the rule cannot be construed so as to enable a

litigant to obtain discovery from any person who is not a party to the proceedings. That is what is sought by this application. I have no doubt whatever that that is the true view to take of the rule; and I think, when the authorities, such as they are (and they are very few), are looked at, there is not one which is adverse to that view. MATHEWS, J.'s view, as expressed in the case of *Central News Co. v. Eastern News Telegraph Co.*, W. N. (1884) p. 23, is clear that this rule does in reality no more than incorporate the preceding statutory enactment to which I have referred; and I think that is so,—with this exception, that the language is made a little more general, so as to extend it to all proceedings in the High Court.

[* 200] * Now, WATKIN WILLIAMS, J., when the case of the *Central News Co. v. Eastern News Telegraph Co.*, came before the Queen's Bench Division, said, (53 L. J. Q. B. 236), and I think very justly, that if rule 7 did confer this power over perfect strangers, it might be a question whether it was not *ultra vires*; and I concur in that view. If it is to be so construed as to give any litigant the right to see the books of anybody who is not a party to the litigation, I should say that it would be *ultra vires*. But I am satisfied that that is not the true construction or meaning of the rule.

There is no other case that I think worth mentioning with reference to this matter.

Then it is said that, upon the facts, this company, although not nominally a party to this proceeding, is really so interested in it that there would be no injustice done in this particular case. I think that is so. Without going into the merits, I think it is very likely that, in this particular case, there would not be any particular injustice done. I will assume that; but the principle involved in that line of argument is a dangerous one, and I, for one, cannot be the first to sanction such a proceeding as is contended for. It appears to me that sound principle is entirely against this order. Therefore, the appeal will be allowed, and the order will be discharged.

BOWEN, L. J. I am of the same opinion.

Rule 7 of Order XXXVII., is not intended to enlarge the rights of a litigant to discovery against third persons who have nothing to do with the action, nor to enlarge his rights to production of documents against them. The rule is one of "practice and pro-

cedure," and therefore is, and can only be, a rule which is intended to enlarge the facilities of obtaining production when production is necessary for the purpose of justice.

Now, in the present instance, the production of the document at the present moment cannot be necessary for the purpose of justice. Whoever heard that there was a right on the part of a litigant, at a time when there was no pending motion and no pending trial, to obtain inspection of a document which belongs to a third person, unless indeed in the possible case where * production of such a document was necessary to carry [* 201] out an order which had already been obtained?

The truth is, that no Judge has a right to think the production of such a document fit at this particular time, inasmuch as it is interfering with rights of third parties at a moment when there is no evidence being taken in the cause, and when the presence of the document is not necessary for the purpose of carrying out or completing any order which has been made.

The Common Law Procedure Act, 1854, s. 46, introduced at common law a very valuable means of obtaining production of documents on the hearing of motions and summonses. At common law, the ordinary subpoena was a *subpœna ad testificandum*, and required the witness to be present in Court for the purpose of giving evidence to be used at the trial. The Common Law Procedure Act gave Judges the power of compelling the attendance of witnesses to be examined, and of directing that documents be produced upon the hearing of motions and summonses. Then came rule 7 of Order XXXVII., the object and scope of which (as has always been said with regard to the Judicature Act) is not to increase rights as against third persons, but to give further facilities for enforcing rights which already exist. That rule does, to a certain extent, go further than the Common Law Procedure Act, because it abstains from making it a condition precedent that an order should be made upon the hearing of a motion or a summons. It says that the order may be made "at any stage of the proceedings" whenever production could be compelled at the hearing or trial. I do not think we ought to try to define the cases exhaustively in which production may be proper. It is sufficient to say that I could conceive a case in which production of a document might be proper, though there was no motion or summons pending; for instance, if an order had already been made, and the

non-production of the document by the third person was a defeating of the rights which had already been declared and a defeating of the order which had already been obtained. But I am as certain as one can be of anything with regard to practice, that it is not intended to enact that at any stage of a proceeding a Judge may make, subject to his discretion, an order on a third person for production of a document which belongs to the third person, unless the production of it at * that moment is a thing to which the parties are entitled for the purpose of justice; and you are not entitled, for the purpose of justice at any moment during suit, simply because you are a litigant, to see what is in the possession of a third person and to have production of it. Such a thing was never heard of. I do not believe it was ever dreamt of until rule 7 was submitted to the ingenuity of counsel. An attempt has been made to extract out of a rule which has simply got to do with "practice and procedure" in an action, a power of obtaining inspection from a third person outside the action. If such a power existed, it would be most inquisitorial, and might be used for purposes of infinite oppression. In this particular case, I dare say it would work no oppression at all; but we have to construe the rule.

Appeal allowed.

ENGLISH NOTES.

The practice as to the production of documents by persons not parties to the action is now regulated in England by R. S. C. 1883. Ord. xxxvii., r. 7, which empowers the Court or a judge in any cause or matter at any stage of the proceedings to order the attendance of any person for the purpose of producing any writings or other documents named in the order, which the Court or judge may think fit to be produced; provided that no person shall be compelled to produce any writing or document which he could not be compelled to produce at the hearing or trial.

As appears from the ruling case, this provision is not intended to give any new right of discovery against such persons, but merely to facilitate the obtaining of production from them at any stage of the proceedings.

Under this rule, a party may be compelled to produce all such documents as he might be compelled to produce at the hearing or trial. *Central News Co. v. Eastern News Telegraph Co.* (1884) 53 L. J. Q. B. 236, 50 L. T. 235, 32 W. R. 493. Where the plaintiff's solicitor in a probate action had also acted as solicitor to the testatrix whose will was in dispute, it was held that no order could be made against him under

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this rule to produce documents in his possession as solicitor to the testatrix. *O'Shea v. Wood* (1891) 1891, P. 286, 60 L. J. P. 82, 65 L. T. 30. But in an action against a married woman, the solicitor to the trustees of her settlement was held bound to produce it, she herself not being entitled to object to its production. *Bursill v. Tanner* (1885), 16 Q. B. D. 1, 55 L. J. Q. B. 53, 53 L. T. 445, 34 W. R. 35. And a conditional order to make discovery of a lease may be made against a tenant of lands ordered to be sold in an action. *Webb v. Webb* (1891), 27 L. R. Ir. 42.

An order may be made under the above rule of court on an *ex parte* application, *In re Smith, Williams v. Frere* (1890) 1891, 1 Ch. 323, 60 L. J. Ch. 328, 64 L. T. 253; and the order when made is equivalent to a *subpœna duces tecum*. *Ib.*

The power conferred by the rule will be exercised with great caution, and an order will not be made before trial merely on the ground that the documents contain matter material to the case and that a saving of expense would thereby be effected. *Central News Co. v. Eastern News Telegraph Co.*, *supra*.

Under this rule the Court has no power to order the inspection of documents as distinct from their production. *Straker v. Reynolds* (1889), 22 Q. B. D. 262, 58 L. J. Q. B. 180, 60 L. T. 107, 37 W. R. 379, dissenting from *Rishdon v. White* (1888), 5 Times L. Rep. 59.

A petition for payment out of Court of the purchase-money of certain land was referred to a referee who reported that the petitioners had established their case. During the hearing a witness not a party was asked in cross-examination by respondent's counsel whether he had in his possession any letters relating to the land. He offered to produce a mass of correspondence. Counsel proposed to call for the letters *seriatim*; but the referee declined to allow this on the ground that it would occupy too much time. Counsel then contended that he was entitled to put in the correspondence *en bloc*, but was not allowed to do so. There was nothing to show that the letters were material to the point at issue beyond mere suspicion, and no application was made to the referee to adjourn the hearing. A respondent having moved to vary the report on the ground that the referee had improperly rejected the correspondence, the motion was refused. *In re Maplin Sands* (1894), 71 L. T. 594.

AMERICAN NOTES.

The New York Code of Procedure restricts the right to compel inspection to the case of books or documents in the possession of the opposite party. *Adriance v. Sanders*, 11 Abbott New Cases, 422. So books of a corporation in possession of the directors may not be subjected to inspection in a suit against the corporation. *Boorman v. Atlantic, &c. R. Co.*, 78 New York, 599.

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In Massachusetts it is held that in such case the officer may be joined as defendant and compelled to make discovery. *Post v. Toledo*, 8 C. R. Co., 144 Massachusetts, 341; 59 Am. Rep. 86. Pomeroy (1 Equity Jurisprudence, sect. 206), says that documents belonging wholly or in part to a third person, not a party to the suit, or in his possession and the defendant's jointly, may not be compulsorily produced; citing English cases.

Before the Codes, a third person could not be compelled by order to produce his private papers. A *subpoena duces tecum* was the proper remedy. *Davenport v. McKinnie*, 5 Cowen (New York), 27; *Morley v. Green*, 11 Paige (New York Chancery), 240; 42 Am. Dec. 112, citing *Ex parte Llewellyn*, 8 Jur. 816.

A bill of discovery does not lie against one not interested, and who may be made a witness. *Price v. Tyson*, 3 Bland Chancery (Maryland), 392; 21 Am. Dec. 691.

No. 5. — HENNESSY v. WRIGHT.

(1888.)

RULE.

DOCUMENTS held by a person in a public capacity as a servant of the State, are privileged from being produced or disclosed in an action, if it appears that the Minister, or Secretary of State, for the Department concerned has on grounds of the public service forbidden the production of the documents.

Hennessy v. Wright.

21 Q. B. D. 509–523 (s. c. 57 L. J. Q. B. 530; 59 L. T. 323).

[509] *Production of Documents. — Privilege. — Affairs of State.*

An action for libel was brought by the governor of a colony, the alleged libel consisting in a statement made by the defendant in a newspaper that the plaintiff, as governor, had sent to the Secretary of State for the Colonies garbled accounts of certain proceedings in the colonial assembly. The defendant pleaded that the statement was true. On an application for discovery by the defendant the plaintiff in his affidavit specified certain documents to the production of which he objected, as follows: "I have in my custody, but acquired and held by me in my capacity of Her Majesty's Governor of M., and subject to the directions of Her Majesty's Secretary of State for the Colonies, a number of copies of various dispatches, reports, and other communications, with the enclosures referred to therein, which passed either between Her Majesty's Secretary of State for the Colonies and myself as such governor as aforesaid, or between the Royal Com-

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missioner appointed by Her Majesty to inquire into the affairs of M. and myself as such governor as aforesaid, or between the said Royal Commissioner and the said Secretary of State. The attention of the said Secretary of State has been directed to the nature and dates of the said documents, and he has directed me not to produce or disclose the said documents, and to object to their production in these proceedings on the ground of the interest of the state and of the public service. In consequence of those instructions and of the rules and regulations of Her Majesty's Colonial Service I am unable to produce the said documents, and I object to produce them on the ground aforesaid." No affidavit or statement was made on behalf of the Secretary of State in support of the objection.

Held, that it sufficiently appeared that the documents in question were privileged from discovery, and that the application must be refused.

Application by the defendant for discovery referred to the Court by DENMAN, J. The nature of the documents and the grounds of the plaintiff's objection to the production of them are stated in the head-note and in the judgments of the Court.

Lumley Smith, Q. C. (W. Graham with him), for the defendant. From the description of the documents given by the plaintiff in his affidavit it may be inferred that their contents are relevant to the issues raised. A mere statement by the plaintiff that the Colonial Secretary has directed him not to disclose them "on the ground of the interest of the state and the public service" cannot render the documents privileged from discovery. Where privilege is meant to be claimed on this ground at the trial, either the head of the department or his deputy appears to claim it, or the * Attorney-General is instructed to do so. [* 510] The same considerations apply to discovery before the trial.

Lockwood, Q. C., and Cagney, for the plaintiff. Accepting, as the Court is bound to do, the statements contained in the affidavit as accurate, the documents are not in "the possession or power" of the plaintiff within the meaning of Order XXXI., r. 14. They are state papers, and as such are the property of the Crown or of the Colonial Secretary. This would clearly be so if they were originals, and the rule must be the same as regards copies. In any case the plaintiff has only a joint possession of the documents with the Colonial Secretary, and he cannot therefore be required to produce them. *Kearsley v. Phillips*, 10 Q. B. D. 36, 465, 52 L. J. Q. B. 8, 269.

The plaintiff has used the only means in his power at this stage of the case of informing the Court that the Colonial Secretary has

prohibited the production of the documents. At the trial the Colonial Secretary can be called as a witness. On an application for discovery he cannot be compelled to make an affidavit.

There is a series of decisions which establishes that it is the duty of the Courts to refuse discovery of documents which are ascertained to be state papers and as such privileged from inspection. *The Bellerophon*, 44 L. J. Adm. 5; *Rajah of Coorg v. East India Company*, 25 L. J. Ch. 345; *Smith v. East India Company*, 1 Phill. 50; *Home v. Bentinck*, 2 Brod. & Bing. 130; *M'Elveney v. Connelan*, 17 Ir. C. L. R. 55.

Lumley Smith, Q. C., in reply. According to *Beatson v. Skene*, 5 H. & N. 838, a personal statement made in Court at the trial by the head of the department that the documents cannot be produced without prejudice to the public service is essential. It is implied in *Kain v. Farrer*, 37 L. T. (N. S.) 469, that the same rule applies to interlocutory proceedings. There being no affidavit by the Colonial Secretary the defendant is entitled to an order for inspection. *Cur. adv. vult.*

June 11. FIELD, J. This is an application by the defendant for discovery in an action brought by the Governor of [*511] Mauritius * against the publisher of the "Times" newspaper for libel. It seems that in Mauritius, as elsewhere, there are rival political parties, the members of which express their views in the popular assembly, and these views the plaintiff as governor is bound to report to the Colonial Secretary. The alleged libel consists in a statement made in the newspaper that the plaintiff "edited" his reports thus made so as to convey to the Colonial Secretary an erroneous impression of the state of public opinion in the colony. The defendant pleads that this statement is true. The plaintiff does not claim that the reports which are said to have been "edited" are privileged from discovery, but he claims that certain other documents are so. Of these documents his affidavit gives the following description: "I have also in my custody (he perhaps purposely does not say 'possession'), but acquired and held by me in my capacity of Her Majesty's Governor of Mauritius, and subject to the directions of Her Majesty's Secretary of State for the Colonies, a number of documents numbered 1 to 8, both inclusive, and tied up in a bundle marked A and initialled by me. Such documents consist of copies of various

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dispatches, reports, and other communications, with the enclosures referred to therein, which passed either between Her Majesty's Secretary of State for the Colonies and myself as such governor as aforesaid, or between the Royal Commissioner appointed by Her Majesty in the year 1886 to inquire into the affairs of the Mauritius and myself as such governor as aforesaid, or between the said Royal Commissioner and the said Secretary of State. The attention of the said Secretary of State has been directed to the nature and dates of the said documents, and he has directed me not to produce or disclose the said documents, and to object to their production in these proceedings on the ground of the interest of the state and of the public service. In consequence of these instructions, and of the rules and regulations of Her Majesty's Colonial Service,¹ I am unable to produce the said documents, and I object to produce them on the ground aforesaid." These statements the Court accepts as true.

It was argued for the plaintiff that *Kearsley v. Phillips*, 10 Q. B. D. 36, 465, 52 L. J. Q. B. 8, 269, *applies. [*512] There a Divisional Court and the Court of Appeal refused to compel the production of deeds which appeared to be the joint property of the defendant and a person not a party to the action. But here it is not, and I suppose could not be, alleged that these copies are the joint property of the plaintiff and the Colonial Secretary. In *Pope v. Curl*, 2 Atk. 342, in which Lord HARDWICKE restrained Curl, the printer, from publishing letters written by the poet Pope, the property in the letters was treated as being in the poet as their writer. History shows that the executors of statesmen have raised questions as to the property in state papers. I believe it was formerly the practice for the head of a department, on his retirement, to take away even originals, but that this has been altered, and that he now has copies prepared, as the plaintiff in this case appears to have done, for his protection. However, as there is no suggestion of a joint property in the copies, *Kearsley v. Phillips* plainly does not apply.

A more important question remains. Accepting the other statements in the affidavit as to the circumstances under which the copies were prepared and the action taken by the Colonial Secretary as true, are the copies privileged? There are two aspects of

¹ A copy of these was produced, but they are not referred to in the judgments of the Court.

this question. First, the publication of a state document may involve danger to the nation. If the confidential communications made by servants of the Crown to each other, by superiors to inferiors, or by inferiors to superiors, in the discharge of their duty to the Crown, were liable to be made public in a Court of justice at the instance of any suitor who thought proper to say *fiat justitia ruat cælum*, an order for discovery might involve the country in a war. Secondly, the publication of a state document may be injurious to servants of the Crown as individuals. There would be an end of all freedom in their official communications, if they knew that any suitor, that, as in this case, any one of their own body whom circumstances had made a suitor, could legally insist that any official communication, of no matter how secret a character, should be produced openly in a court of justice.

Other exceptions allowed by the law to the absolute right [* 513] of the suitor to discovery, the privilege * of the communications which pass between a solicitor and his client, or that of those made by an informer to a revenue officer, may be explained in a similar manner.

As regards state documents, the law is well stated in *Smith v. East India Company*, 1 Phill. 50, and *Home v. Bentinck*, 2 Brod. & Bing. 130. In *Smith v. East India Company* it was held in Chancery that the Company was not bound to produce in answer to a bill of discovery a correspondence between the directors of the Company and the Board of Control, the state department to which the directors were responsible. The case turned to some extent on an Act of Parliament, and Lord LYNCHURST said: "It is quite obvious that public policy requires, and, looking to the Act of Parliament, it is quite clear that the legislature intended, that the most unreserved communication should take place between the East India Company and the Board of Control, that it should be subject to no restraints or limitations; but it is also quite obvious that if at the suit of a particular individual these communications should be subject to be produced in a court of justice, the effect of that would be to restrain the freedom of the communications, and to render them more cautious, guarded, and reserved. I think, therefore, that these communications come within the class of official communications which are privileged, inasmuch as they cannot be subject to be communicated without infringing the policy of the Act of Parliament and without injury to the public

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interest." The only difference between that case and the present is, that here a servant of the Crown, who is himself a party to the communications, is plaintiff. But a servant of the Crown ought not to be placed at a disadvantage in comparison with other subjects, and the plaintiff will be placed at a serious disadvantage if, because he is a servant of the Crown, he cannot defend his honour without the seal of secrecy being removed from his official communications. In *Home v. Bentinck* there is an admirable exposition of the same principle by DALLAS, C. J. That was an action for libel, brought by an officer in the army against the president of a commission appointed by the Commander-in-Chief to report as to his conduct in relation to a speculation.

The libel was said to *be contained in the report. The [*514] minutes were brought into Court by the military secretary to the Commander-in-Chief, the official having the custody of such documents. ABBOTT, C. J., refused to allow them to be read. A bill of exceptions to his ruling was tendered, and there was a long argument. The Court held the ruling of ABBOTT, C. J., right "on the broad principle of state policy and public convenience, and upon the principle of all the cases cited." Now the copies in question are described as copies of communications which have passed between the Colonial Secretary and the governor of a colony, or between one or other of these high officials and a Royal Commissioner appointed to investigate the affairs of the colony. These communications are state documents of the same class as those in the cases cited, and therefore the copies are also state documents and are *prima facie* as such privileged from production.

It is, however, argued that the copies are not privileged because there has been no sufficient claim of privilege by the Colonial Secretary. It is said, that, as at *nisi prius*, it would be according to practice that the Colonial Secretary or his authorized representative should appear to state that he objects to the production of the documents, so here on a summons for discovery, a personal affidavit by the Secretary of State or his deputy is essential, and that there being no such affidavit, the plaintiff is entitled to inspection. The principal case relied on in support of this contention is *Beatson v. Skene*, 5 H. & N. 838, 29 L. J. Ex. 430. That was an action for slander brought by a general who had served in the Crimea. There was a question as to the minutes of a military

inquiry and other documents at the War Office. The Secretary for War attended at *nisi prius* and objected to the production of the papers as prejudicial to the public service, and BRAMWELL, B., declined to compel their production, basing his refusal solely on the ground of the statement made in court by the Secretary for War. This ruling was considered by the Court of Exchequer on an application for a new trial, with the result that POLLOCK, C. B., and WILDE, B., agreed with BRAMWELL, B., MARTIN, B., dissenting. POLLOCK, C. B., says, in giving the judgment of the Court: "It is manifest that the question must be [*515] determined either by the presiding Judge or by * the responsible servant of the Crown in whose custody the paper is. It appears to the majority of the Court (*i. e.*, POLLOCK, C. B., and BRAMWELL and WILDE, BB.) that the question must be determined not by the Judge, but by the head of the department having the custody of the paper; and if he is in attendance, and states that in his opinion the production of the document would be injurious to the public service, we think the Judge ought not to compel the production of it. My brother MARTIN is of opinion that, whenever the Judge is satisfied that the document may be made public without prejudice to the public service, the Judge ought to compel the production, notwithstanding the reluctance of the heads of the department." As regards the question thus raised, I desire to say, while disclaiming all intention of dictating to the Judge who may try this case, that I do not feel the difficulty which appears to have weighed with the majority of the Court, and that, should the head of a department take such an objection before me at *nisi prius*, I should consider myself entitled to examine privately the documents to the production of which he objected, and to endeavour, by this means and that of questions addressed to him, to ascertain whether the fear of injury to the public service was his real motive in objecting. It is clear, however, that this decision has no bearing on the present case. The judgment refers not to a summons for discovery, at which the head of the department does not and need not attend, either personally or by deputy, and as regards which neither he nor any one on his behalf is under any obligation to make an affidavit, but to a proceeding at *nisi prius* at which the head of the department has both appeared and objected.

I think, however, that there is authority for refusing production

of these copies at this stage of the case, apart from any intervention of the Colonial Secretary. In *Anderson v. Hamilton*, 2 Brod. & Bing. 156, n., Lord ELLENBOROUGH at *nisi prius* refused to admit in evidence a correspondence between the Colonial Secretary and the governor of a colony, although the Colonial Secretary was present and raised no objection. In *Home v. Bentinck*, 2 Brod. & Bing. 130, DALLAS, C. J., treats this as the right course for the presiding Judge to adopt under such circumstances. In neither of the cases in * which the East India Company [* 516] was concerned, neither in *Smith v. East India Company*, 1 Phill. 50, nor in *Rajah of Coorg v. East India Company*, 25 L. J. Ch. 345, where the production of similar documents was refused, in the one case by Lord LYNTHURST, in the other case by KNIGHT BRUCE, L. J., was there any affidavit on behalf of the Board of Control. In *The Bellerophon*, 44 L. J. Adm. 5, where the point arose with reference to a report made to the Lords of the Admiralty by a captain in the navy, an affidavit was made on behalf of the Lords of the Admiralty, but I do not gather that the existence of this affidavit was the ground of the refusal of the Court to order the production of the report. In *McElveney v. Connellan*, 17 Ir. C. L. R. 55, where the question was as to the liability to production of a report made by the Inspector-General of Prisons in Ireland to the Lord Lieutenant, the point was raised both on a summons for discovery and at the trial, and the Judges of the Irish Court held that on both occasions production was properly refused on the ground of the public interest. At the trial the Attorney-General for Ireland appeared and objected on behalf of the Lord Lieutenant, but on the summons discovery was refused though there was not any affidavit by or on behalf of the Lord Lieutenant before the Court. For these reasons I am of opinion that discovery of these documents ought not to be granted at this stage of the case. I say nothing as to what course should be taken at the trial. The order must, therefore, be refused.

WILLS, J. The plaintiff in this case sues the defendant for libel, the substance of the libel being that the plaintiff, as Governor of the Mauritius, "edited" reports of speeches by various members of the council of Mauritius, which he sent home to the Secretary of State as the speeches spoken by the persons to whom they were attributed. The defendant justifies. The plaintiff was called upon for an affidavit of documents. He sets out and offers

to produce for inspection copies of what I may call the incriminated dispatches and speeches, but besides them he admits the possession of (*inter alia*) a bundle of papers numbered 1 to '8, and sufficiently identified, which he says are "copies of [* 517] * various dispatches, reports, and other communications which passed either between the Colonial Secretary and himself in his capacity as Governor of the Mauritius, or between the Royal Commissioner appointed by Her Majesty in 1886 to inquire into the affairs of the Mauritius and himself as governor of the colony, or between the said Commissioner and the Colonial Secretary." He adds, "that the attention of the Colonial Secretary has been directed to the nature and dates of the documents, and that the Colonial Secretary has directed him not to produce or disclose them, and to object to their production on the ground of the interest of the state and of the public service."

The plaintiff objects on these grounds to their production, and the question is whether, under these circumstances, an order ought to be made for their inspection.

Had the Secretary of State himself made affidavit that in his opinion, the production of the documents would be injurious to the public service, the question would, I think, in the absence of special circumstances, have been completely governed by authority: see *Beatson v. Skene*, 5 H. & N. 838, 29 L. J. Ex. 430; *The Bellerophon*, 44 L. J. Adm. 5; *Smith v. East India Co.*, 1 Phill. 50; *Rajah of Coorg v. East India Co.*, 8 De G. M. & G. 182. The case was before us a short time ago upon an application for a further affidavit of documents, and we then pointed out that the objection had in many reported cases been taken in this fashion, and in this way the plaintiff's attention was pointedly called to the fact that such materials would leave the Court in no doubt as to the proper action to take. The plaintiff, however, is not furnished with any such materials. Whether he is unable or unwilling to avail himself of the suggestion I do not know. It is argued on his behalf that he has complied with what is necessary in this respect by the portion of his affidavit which says that he is directed by the Secretary of State not to produce the documents. I am of opinion, however, that if the case be one in which the Court ought to require the assurance of the Secretary of State that production would be prejudicial to the public interests, the plaintiff's affidavit falls far short of what is necessary. The state-

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ment that the attention of the Secretary of State has * been directed to the nature and dates of the documents [* 518] is far too vague. If this kind of assurance be necessary at all, I think it ought to appear that the Secretary of State has seen and considered the documents, and has formed a real judgment as to the propriety of their being produced, something going much beyond the fact that his attention has been called, presumably by the plaintiff himself, "to their nature and dates." In such a case there should, in my opinion, be a statement on oath, either by the Secretary of State himself, or by some person duly commissioned by him to make on his behalf such a statement, that the matter has been considered by the Secretary of State, and that he assures the Court in one of these ways that the production would in his opinion be prejudicial to the public service. A statement in court on his behalf by the Attorney-General has sometimes been accepted as equivalent to the oath of the Secretary of State, a point upon which I express no opinion. But, in my judgment, if the Secretary of State's assurance be necessary in order to protect the documents from inspection, a mere statement, such as is contained in the plaintiff's affidavit, is quite insufficient, — a proposition for which, I think, that *Kain v. Farrer*, 37 L. T. (N. S.) 469, is an authority, — and I think that under such circumstances the assurance should be given in some fashion less open to exception than by the affidavit of one of the parties to the action in which discovery is sought. I do not mean to lay down as a matter of law that such a method of proving the objection of the head of the department can in no case and under no circumstances be accepted. Artificial rules upon matters of evidence are better avoided as far as is possible. I only wish to say that to me, in the present case, which presents no exceptional circumstances to justify it, this method of establishing the fact relied upon is not such as I should be prepared to act upon.

The question therefore arises whether, in the absence of objection by the responsible minister of the Crown, it is the duty of the Judge on an application for discovery to prevent the disclosure of the contents of such documents as those now in question, viz., dispatches on matters connected with the public service passing between the governor of a colony and the Secretary * of State. A document of this character is undoubtedly [* 519] in the nature of a state paper. *Primâ facie*, and if

it is what it professes to be, it is called into existence simply for the service of the state, and it may be expected to relate not to mere matters of business and routine, but to matters of government and policy, and to be in its nature private and confidential. There are, undoubtedly, many matters in respect of which it is the duty of the Judge, quite apart from objection taken, to prevent disclosures of a class which it would be undesirable in the public interests to permit. If a police officer, for example, were asked in court from what source he got his information in respect of an offence, it would, I apprehend, as a general rule, be the duty of the Judge to direct him not to answer the question, since the mere possibility of having such information disclosed would operate as a powerful check upon persons disposed to give information in respect of such matters.

In my opinion the present case is covered by authority. In *Anderson v. Hamilton*, 2 Brod. & Bing. 156, n., in an action against the Governor of Heligoland for false imprisonment, a correspondence between Lord Liverpool and the defendant was produced by the Under Secretary of State. He made no objection on behalf of the Government to the production of the letters; but, notwithstanding that fact, and whilst calling attention to it, Lord ELLENBOROUGH declined to allow "secrets of state to be taken out of the hands of Her Majesty's confidential servants." This was in the year 1816. In *Home v. Bentinck*, 2 Brod. & Bing. 130, an action was brought against an officer who had been directed by the Commander-in-Chief to hold an inquiry touching the conduct of the plaintiff, an officer in the army, for alleged libels contained in the report of that inquiry. The case was tried in 1819 before ABBOTT, C. J. The report was produced by Sir H. Torrens, the military secretary to the Commander-in-Chief, and no objection was raised by him or on behalf of the Commander-in-Chief to its production, but, upon objection by the defendant's counsel, the CHIEF JUSTICE rejected it on the ground now under discussion. A bill of exceptions was tendered and the case was argued before the Court of Exchequer Chamber. The question was not [* 520] whether the defendant was entitled to * protection from the consequences of publishing a libel on the ground that it was a privileged communication, but whether the judge was right in excluding it altogether at the trial. "The question," said DALLAS, C. J., in delivering the judgment of the Court, "is

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whether if Sir Henry Torrens under a mistake had been disposed," to produce the report, "it would not have been the bounden duty of the learned Judge before whom the case was tried, considering that this document was a secret, not the privilege of the party holding it, but of which he was a trustee on behalf of the public, to have interposed and prevented the admission of such evidence," and the ruling of the learned LORD CHIEF JUSTICE was upheld "on the broad ground of state policy and public convenience." In *McElreney v. Connellan*, 17 Ir. C. L. 55 (186), the Irish Court declined on the same grounds, and on an application for discovery, to order production of a report of the Inspector General of Prisons to the Lord Lieutenant, although there was no evidence before it of objection on the part of the Lord Lieutenant. This decision was referred to with approval by Sir JOSEPH NAPIER in *Stace v. Griffith*, L. R., 2 P. C. 420, 425, decided in 1869, and in that case, both in the course of the argument and in delivering the judgment of the Privy Council, Lord CHELMSFORD refers to *Anderson v. Hamilton*, 2 Brod. & Bing. 156, n., as laying down the correct rule as to the admissibility of public documents, and that official letters are not receivable in evidence. "It was absolutely necessary," said Lord CHELMSFORD, "before any evidence of the contents of this letter was admitted, that the Judge should determine that it was not an official communication." In 1873, in *Dawkins v. Lord Rokeby*, L. R., 8 Q. B. 255, an action for libel was brought against the defendant for statements made to the Commander-in-Chief in the report of a court of inquiry upon the conduct of an officer, the contents of the documents in question were stated to the jury, whereupon BLACKBURN, J., directed a verdict for the defendant on the ground that such proceedings were absolutely privileged, even if the statements they contained were wilfully false and malicious. A bill of exceptions was tendered, and the case was heard by the Court of Exchequer Chamber in 1873. It was held * by that Court, on the authority [* 521] of *Home v. Bentinck*, 2 Brod. & Bing. 130, at p. 162, that the proceedings in question were inadmissible in evidence. "We cannot doubt," said the learned LORD CHIEF BARON, "that if the attention of the Judge who tried this cause had been called to this decision, although the parties had admitted the evidence, he would have felt it, in the language of DALLAS, C. J., his bounden duty to have interposed and prevented the admission of such evidence."

I think the above cases abundantly show that no sound distinction can be drawn between the duty of the Judge when objection is taken by the responsible officer of the Crown, or by the party, or when, no objection being taken by any one, it becomes apparent to him that a rule of public policy prevents the disclosure of the documents or information sought.

With one exception, the cases cited arose with reference to evidence sought to be introduced upon the trial. It is obvious that whatever difference may exist between the case of evidence asked for or tendered at the trial and that of an application for discovery or inspection, is altogether in favour of a refusal to order discovery in the earlier stages of the case. I should be reluctant to say anything which could interfere with the discretion of the Judge at *nisi prius*, or to treat it as impossible for circumstances to arise which might justify a Judge at the trial in deciding that a particular document of the class under consideration ought to be produced. At the trial, in most cases, the document is only to be got at by subpoenaing the head of the department of state concerned with it. It has happened, and may happen again, that, instead of stating that in his opinion it ought in the interest of the public service to be withheld, he submits that very question to the Court. The responsible officer of state being subpoenaed has, at all events, the opportunity of considering the question and taking the objection, and the Judge at the trial has a much better opportunity of judging whether production ought to be ordered or allowed than the Court can have upon an application at the present stage of the action, when, unless production be refused, mischief might be done behind the back and without the knowledge of the officer of state, who, to put it at the lowest, would [* 522] certainly have a right * to state his objections to production, a right which, in all but exceptional cases, would be pretty certain to secure the protection claimed. The question whether or not in the public interest production of the document should not be allowed is so far a matter of state rather than of legal decision, that it is within the undoubted competence of the responsible minister of the Crown, by taking the proper steps, to interfere and raise an objection to which every tribunal would be certain, to say the least, to pay respectful attention; and we must be careful, in dealing with an interlocutory application like the present, to see that a right which has been established for great

purposes of public welfare, and which, with one exception presently to be noticed, has been uniformly respected at *nisi prius* for a great number of years, is not frustrated by an order for discovery.

The only cases which can be cited as establishing anything like a conflict of authority upon this important question are *Dickson v. Lord Wilton*, 1 F. & F. 419, and *Kain v. Farrer*, 37 L. T. (N. S.) 469.

In *Dickson v. Lord Wilton*, Lord CAMPBELL compelled a clerk in the War Office, who attended upon a subpœna addressed to the Commander-in-Chief, to produce letters written by the commanding officer of a regiment to his superior officer touching matters connected with the discipline of the regiment, in spite of his statement that he was directed by the head of the department to refuse to produce them. In *Beatson v. Skene*, 5 H. & N. 838, 854, the Court of Exchequer, after holding that the proceedings of a military court of inquiry to the production of which objection was taken by the Secretary for War, could not in the circumstances of that case be produced, went on to refer to *Dickson v. Lord Wilton*, and to observe that if the documents were produced without objection, or with a mere submission to the Judge as to whether they should be produced or not, "the case might be different." In *Dawkins v. Lord Rokeby*, L. R., 8 Q. B. 255 at p. 273, it was said by the Court of Exchequer Chamber that *Dickson v. Lord Wilton* was in conflict with a mass of authorities, and must be considered as overruled. In *Kain v. Farrer*, an action against the Secretary of the Board of Trade for acts done by the Board of Trade, privilege was *claimed for certain docu- [*523] ments on the ground that the defendant objected on the ground of public policy to produce them. It was held that the affidavit was insufficient, and production was ordered. If that case is in conflict with the numerous authorities above cited, and it seems to me difficult entirely to reconcile it with them, it is clear that they must prevail, and that *Kain v. Farrer* cannot be supported.

It was argued on behalf of the plaintiff that the application was in any case premature, and that at this stage an order for discovery could not be made, although the documents might be liable to be disclosed at the trial; and it has undoubtedly happened that in many reported cases the objection has been taken at the trial, and

not at an application for discovery, which, as regards the Courts of Common Law, is a modern proceeding. In my opinion, however, there are reasons, which I have already pointed out, for refusing discovery which may possibly not apply at the trial; and whilst I should be sorry to limit unnecessarily the right to see documents at the only stage of the case at which, very often, they are of any practical value, on the other hand it must not be forgotten that to order production may render of no avail the right of the Crown, which exists in the public interest, to object in the proper manner to publicity being given to the documents.

The plaintiff sought to exclude the documents in question on the ground that they do not belong to him, but to the Secretary of State. If this be anything but another way of putting the proposition already dealt with, I do not accede to it. The copies to which the matter now in hand relates are, as far as I can see, subject to the duty upon him not to disclose them, the plaintiff's own, and *Kearsley v. Phillips*, 10 Q. B. D. 36, 465, 52 L. J. Q. B. 8, 269, and similar decisions, to which a large part of the arguments for the plaintiff was addressed, appear to me to have nothing to do with this case, which is not one of joint ownership or custody at all, nor depending upon any considerations applicable to such cases. In my opinion the order asked for must be refused.

Order refused.

ENGLISH NOTES.

The rule that no evidence, either oral or documentary, can be asked for or given, the disclosure of which would be injurious to the interests of the public, is so well established that it is hardly necessary to cite authorities in its support.

Reference may however be made to *Beatson v. Skene* (1860), 5 H. & N. 838, 29 L. J. Ex. 430, 2 L. T. 378, 8 W. R. 544, 6 Jur. (N. S.) 780, where it was held that a judge at *nisi prius* has no power to compel a witness to produce documents connected with affairs of state if their production would be injurious to the public service; and *Hughes v. Targus* (1894), 9 R. 661, to the same effect. In *Wright v. Mills* (1890), 62 L. T. 558, which was an action against the Agent General to a colonial government, the defendant having objected to produce certain documents which were the property of that government and which he had acquired merely as Agent General, and which the Prime Minister of the Colony had directed him not to produce on the ground of public interest except under an order of the Court, — on a summons

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for production by the plaintiffs, it was held that an official was only entitled to use such documents for his own protection, and not for ordinary purposes, and that the Court had no jurisdiction to order him to produce them.

Where an independent Sovereign prince who had filed a bill in equity against the East India Company for recovery of two promissory notes of the company taken from him as spoils of war, upon coming in of the answer moved for production of documents, it was held that he was not entitled to their production as they related to matters of government. *Rajah of Coorg v. East India Co.* (1856), 25 L. J. Ch. 354; S.C. nom. *Wadeer v. East India Co.* (1856), 8 De G. M. & G. 182, 2 Jur. (N. S.) 407 (and see 1 R. C. 826).

Communications in official correspondence relating to matters of State cannot be produced in evidence in an action against a person holding an office, for an injury alleged to have been done in the exercise of such office. *Anderson v. Hamilton* (1816), 8 Price, 244 n., 4 Moore, 593 n., 2 Brod. & Bing. 156 n., 22 R. R. 751 n. Nor is a witness bound to answer questions relating to communications between the Governor of a distant province and his Attorney-General. *Wyllatt v. Gore* (1816), Holt, 299.

Reports made in the discharge of the duties of their offices by government officials to the Crown, or its representatives, are state documents, and their production cannot be enforced in a court of law. *M'Elveney v. Connellan* (1864), 17 Ir. C. L. R. 55.

Where a commander-in-chief directed a military inquiry into the conduct of a commissioned army officer, who afterwards sued the president of the inquiry for a libel alleged to be contained in his report, such report was held on grounds of public policy to be privileged, and properly rejected as evidence at the trial. *Home v. Bentinck* (Lord) (1860), 2 Brod. & Bing. 130, 4 Moore, 563, 8 Price, 225, 22 R. R. 748. And the director of public prosecutions cannot be asked to disclose the name of his informant upon a criminal trial or any subsequent civil proceedings arising out of it, unless it seems to the judge in the criminal trial that a miscarriage of justice would be likely to ensue from the strict enforcement of the rule. Per BOWEN, L. J., in *Marks v. Beyfus* (1890), 25 Q. B. D. 494, 59 L. J. Q. B. 479, 63 L. T. 733, 38 W. R. 705, 17 Cox, C. C. 196.

The general rule is also supported by the cases cited below.

The question whether the production of the documents would be injurious to the public service must be determined, not by the judge, but by the head of the department having the custody of the documents or his deputy. *Beatson v. Skene, supra*. Thus where a collision occurs between one of the Queen's ships and a ship belonging to a private

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owner, and the captain of the former makes a report to the Lords of the Admiralty, the Court of Admiralty will not, in a cause against the captain in which an appearance has been entered by the Queen's Proctor by order of the Lords of the Admiralty, order the report to be produced for inspection, if the Secretary to the Lords of the Admiralty makes an affidavit that such production would prejudice the public service. *The Bellerophon* (1875), 44 L. J. Ad. 5, 31 L. T. 756, 23 W. R. 248. And see also the ruling case and the authorities cited above. It is true that in *Kain v. Farrer* (1877), 37 L. T. 469, which was an action against the Secretary of the Board of Trade for acts done by the servants of the board, it was held that the Secretary was not entitled to refuse production of documents in his official custody, though he had made an affidavit stating that he objected to disclose them on grounds of public policy. That case, however, according to WILLS, J., in the ruling case, seems to be opposed to the weight of authority and therefore not entitled to prevail.

The Court will not inquire whether the objection of the State Authority to the production is well founded, except where an excuse is made which seems palpably futile and frivolous. *Hughes v. Fergus* (1894), 9 R. 661. Where production has been refused on the ground of public interest, secondary evidence of the contents of the document cannot be given. *Ib.*

A member of parliament or the Speaker of the House of Commons may be asked whether a member spoke in a certain debate, but not what he said. *Plunkett v. Cobbett* (1804), 5 Esp. 136.

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(C. A. 1878.)

RULE.

DOCUMENTS prepared in relation to an intended action, whether at the request of a solicitor or not, and whether ultimately laid before the solicitor or not, are privileged from discovery if prepared with a *bonâ fide* intention of being laid before the solicitor for the purpose of taking his advice.

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Southwark and Vauxhall Water Company v. Quick.

3 Q. B. D. 315–323 (s. c. 47 L. J. Q. B. 258; 26 W. R. 341).

Discovery and Inspection of Documents. — Solicitor. — Privilege.

Documents prepared in relation to an intended action, and with a *bonâ* [315] *fide* intention of being laid before the defendant's solicitor for the purpose of taking his advice, held to be privileged; and application for inspection of such documents refused.

Application on behalf of the defendant for the inspection of certain documents that had been scheduled by the plaintiffs in their affidavit of discovery. The application was referred by FIELD, J., from chambers to the Court. The action was by the company against their former engineer to recover various sums of money which, it was alleged by the company, had been wrongly debited to them in accounts that had been settled between them and the defendant.

The documents in question were stated in the plaintiff's affidavits to be as follows:—

1. A transcript of short-hand writer's notes of a conversation between a chimney-sweep employed by the company and the company's engineer, for the purpose of such engineer's obtaining information and reporting the same to the board of directors to be furnished to the company's solicitor for his advice in relation to the intended action.

2. Transcripts of shorthand writer's notes, of interviews between the chairman of the company and the engineer, and certain inspectors of the company, obtained with a view of submitting the same to the company's solicitor for advice in relation to the intended action. The transcripts of the notes were afterwards handed to such solicitor.

3. A statement of facts drawn up by the chairman of the company to be submitted to the company's solicitor for advice in relation to the intended action. It appeared that the statement of facts was afterwards submitted to the solicitor.

* Feb. 4. J. C. Mathew, for the defendant, moved for a [* 316] rule for inspection of the documents in question. The case of *Anderson v. Bank of British Columbia*, 2 Ch. D. 644, 45 L. J. Ch. 449, is an authority directly in the defendant's favour. It is

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clear since that decision that it is not sufficient in order to make a document privileged that it should have come into existence in contemplation of litigation. It was there held by the Court of Appeal, that a written communication by an agent to his principal made in contemplation of litigation was not privileged. *Bustros v. White*, 1 Q. B. D. 423, 45 L. J. Q. B. 642, is another decision of the Court of Appeal to the same effect. The effect of those decisions is to confine the privilege to communications between the party to the litigation and his solicitor. If, on the advice of the solicitor when consulted with reference to the litigation, or at his instance, or at his request, written communications are procured from an agent of the party to be submitted to such solicitor, those communications would fall within the same rule as written communications by the party to his solicitor. But there can be no privilege until the relation as solicitor and client is established, and the solicitor is consulted, and then only with regard to documents that are in the nature of communications between the party and his solicitor. Communications spontaneously procured by the party from his agent to be submitted to his solicitor, are not privileged, and the other side is as much entitled to discovery of them as of any other document relating to the subject-matter of the action in the principal's possession. Knowledge that the principal procures from his agent with regard to the subject-matter of the action, before the relation of solicitor and client has commenced, is not within the principle upon which the privilege is based. Even if the documents that were actually submitted to the plaintiff's solicitor were privileged, document No. 1, which is not stated to have been actually submitted to the solicitor, is not privileged. In *Friend v. London, Chatham, and Dover Ry. Co.*, 2 Ex. D. 437, 46 L. J. Ex. 696, the affidavit stated that the communications were written at the instance and for the use of the solicitors of the defendants, for the purpose of the legal proceedings.

Arthur Wilson, for the plaintiffs, showed cause. The [* 317] present * case is not within the authority of the decisions that have been cited. It is admitted that the only privilege is with reference to the relation between solicitor and client. In those cases the documents in question had nothing to do with such relation. It is not disputed that communications procured by the advice of the solicitor are privileged. This is pointed out

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in the judgment of JESSEL, M. R., in *Bustros v. White*, 1 Q. B. D. 423, 45 L. J. Q. B. 642.

The documents in the present case are intermediate between those held not to be privileged in *Anderson v. Bank of British Columbia*, 2 Ch. D. 644, 45 L. J. Ch. 449, and those which it was laid down would be privileged in *Bustros v. White*. These documents, though not procured on the advice of the solicitor, and indeed procured before he was consulted, were nevertheless procured as instructions to the solicitor, or as materials for such instructions. It is submitted that document No. 3, which constituted the instructions to the solicitor for the action then determined on, was clearly privileged, and it is contended that documents Nos. 1 and 2, which were the materials for such instructions, fell within the same privilege. There being no decision exactly in point, it is necessary to look to the reason of the privilege. The reason of it is that it is essential to the interests of justice that there should be complete freedom of communication between the client and the solicitor. This freedom cannot be protected unless the privilege goes as far as is now contended for on behalf of the plaintiffs.

J. C. Mathew, in reply. The defendant's contention would really destroy the effect of the decisions in the Court of Appeal. Such communications are always submitted to the solicitor, and it would be always said that they were procured as materials for instructions to him.

COCKBURN, C. J. I am of opinion that this application should be refused. We are bound by the decisions of the Court of Appeal which have been cited, but the principle of those decisions does not appear to me to include the present case. The relation between the client and his professional legal adviser is a confidential relation of such a nature that to my mind the maintenance of the privilege with regard to it is essential to the interests of

* justice and the well-being of society. Though it might [* 318] occasionally happen that the removal of the privilege would assist in the elucidation of matters in dispute, I do not think that this occasional benefit justifies us in incurring the attendant risk. The question here is whether the documents of which inspection is sought are within the privilege. I think they are. It is clear that they were documents containing information which had been obtained by the plaintiffs with a view to consult-

ing their professional adviser. Two out of the three sorts of documents were actually submitted to him; as to the other it is not clear whether it was actually submitted to him or not. It is admitted upon the decisions that where information has been obtained on the advice of the party's solicitor it is privileged. I can see no distinction between information obtained upon the suggestion of a solicitor, with the view of its being submitted to him for the purpose of his advising upon it, and that procured spontaneously by the client for the same purpose. Again, I see no distinction between the information so voluntarily procured for that purpose and actually submitted to the solicitor, and that so procured but not yet submitted to him. If the Court or the Judge at chambers is satisfied that it was *bonâ fide* procured for the purpose, it appears to me that it ought to be privileged. Though fully recognizing the authority of the decisions of the Court of Appeal which have been referred to, I do not feel bound nor am I disposed to carry the doctrine of those decisions to the extent suggested on behalf of the defendant.

MELLOR, J. I agree with the opinion expressed by my Lord. I am satisfied that the decisions of the Court of Appeal, by which I am entirely prepared to abide, do not govern this case. It is conceded that information procured by the advice of a solicitor to be submitted to him is privileged. If so, I cannot understand the distinction between such information and that spontaneously procured for the same purpose. I cannot think that the Court of Appeal meant to decide that such information must be disclosed. I do not see any sound distinction between the document that was not actually submitted to the solicitor and those that were, provided the former was really intended to be submitted to him.

[* 319] * MANISTY, J. As to the documents that were actually submitted to the solicitor, I entirely agree. As to the other document, I have some doubt; but the distinction is perhaps rather subtle, and I am not prepared to differ from my Lord and my Brother MELLOR. With regard to the statement of facts by the chairman, it would be monstrous that such a statement, made for the purpose of being laid before the company's solicitor, and actually laid before him, should not be privileged. What can be the difference between asking to see such a statement and asking what oral instructions were given to a solicitor? The same

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principle also applies, I think, to the other set of documents that were submitted to the plaintiffs' solicitor. *Order refused.*

Feb. 20. The defendant appealed.

J. C. Mathew, for the defendant.

Arthur Wilson, for the plaintiffs.

The arguments and the cases cited were the same as in the Court below.

BRAMWELL, L. J. I am of opinion that this case is governed by the principle laid down in *Anderson v. Bank of British Columbia*, 2 Ch. D. 644, 45 L. J. Ch. 449, and that the appeal should be dismissed.

BRETT, L. J. I am of the same opinion. It seems to me that the case of *Bustros v. White*, 1 Q. B. D. 423, 45 L. J. Q. B. 642, is not in point; the documents which the plaintiff declined in that case to produce were letters forming part of a correspondence between the plaintiff and other persons, and not between the plaintiff and his solicitor; neither is the present case governed by *Friend v. London, Chatham, and Dover Ry. Co.*, 2 Ex. D. 437, 46 L. J. Ex. 696, for in that case the communications were written "at the instance, and for the use of the solicitor." The question, therefore, depends upon what is the principle to be extracted from *Anderson v. Bank of British Columbia*. The facts of that case do not apply to the present, but the judgment lays down a rule upon which we ought to act. JAMES, L. J., lays down a rule, which I think is in effect what was said by JESSEL, M. R., * in the Court below, and also mentioned [* 320] by MELLISH, L. J., in his judgment; he says, "Looking at the *dicta*, and the judgments cited, they might require to be fully considered; but I think they may possibly all be based upon this, which is an intelligible principle, that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief." Now reading that passage with what was said by MELLISH, L. J., in the course of the argument, it is clear that if a party seeks to inspect a document which comes into existence merely as the materials for the brief, or that which is equivalent to the brief, then the document cannot be seen, for it is privileged. It has been urged that the materials, or the information obtained for the brief, should have been obtained "at the instance" or "at the request"

of the solicitor; but I think it is enough if they come into existence merely as the materials for the brief, and I think that phrase may be enlarged into "merely for the purpose of being laid before the solicitor for his advice or for his consideration." If this is the correct rule, the only question is whether the affidavits in the present case bring the documents under discussion within that rule. I think all the classes of documents mentioned are brought within the rule. The only document about which there can be any doubt is the transcript of the shorthand writer's note of the conversation between the chimney-sweep and the company's engineer; but I think that the Queen's Bench Division construed the language of the affidavit to mean that the transcript was made in order that it might be furnished to the solicitor for his advice, although, before passing on to him, it was to be laid before the board of directors, or reported to the board, in order that they also might see it. The object for which the notes were taken, and the transcript made, was that they might be furnished to the solicitor for his advice. If that is so, then it stands on the same footing as the others, except that it was not sent to the solicitor; that cannot make any difference. If at the time the document is brought into existence its purpose is that it should be laid before the solicitor, if that purpose is true and clearly appears upon the affidavit, it is not taken out of the privilege merely because afterwards it was not laid before the solicitor. It might not have [* 321] been laid before the solicitor, *because the person making the statement had died or went away and could not be found. I think, therefore, that this document having been made *bonâ fide* merely for the purpose of being laid before the solicitor for his advice or his consideration, it is precisely like the other documents, and that all the documents are privileged.

COTTON, L. J. I am of opinion that the judgment of the Queen's Bench Division was right. We are discussing the question of discovery, but discovery in a particular way, and I call attention to that, because in the argument I think sufficient distinction was not taken between the particular modes of discovery: discovery by the production of documents, and discovery by compelling an opponent to answer interrogatories. As regards the latter, the directors of a company, in answering interrogatories, must not only answer as to their own individual knowledge, but in answering for the company they must get such information as

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they can from other servants of the company who personally have conducted the transaction in question, and they cannot properly answer interrogatories by saying they know nothing about the matter, when it is in their power to obtain information from other servants of the company who may have personal knowledge of the facts; and it is perfectly clear if the information has been communicated to them from the other servants of the company, in answering interrogatories properly administered to them, they must disclose to their opponent the knowledge which they got from that communication, even though the communication itself may be a document which is privileged.

We are now dealing with the production of documents, and the question is, whether the documents do or do not come within what is called privilege? Privilege only extends to communications with legal advisers, or in some way connected with legal advisers; communications with a most confidential agent are not protected if that confidential agent happens not to be a solicitor. And this proceeds on the principle that laymen (by which I mean persons not learned in the law) cannot be expected to conduct their defence or litigation without the assistance of professional advisers; and, for the purpose of having the * litigation con- [* 322] ducted properly, the law has said that communications between the client and the solicitor shall be privileged, and that no one shall be entitled to call for the production of a document which has been submitted to the solicitor for the purpose of obtaining his advice, or for the purpose of enabling him to institute or to defend proceedings. There must be the freest possible communication between solicitor and client, and it is on this ground that professional communications are entitled to privilege, which excepts them from the general rule. The most obvious form of claiming privilege is when any litigant sends either directly or indirectly to his solicitor a document for the purpose of obtaining his advice, or for the purpose of enabling him to institute or defend an action. That is not quite the question here, but there is another class of cases, where information or evidence, which is usually obtained by the solicitor himself, is not obtained by him, but a document stating what evidence can be given is prepared to be communicated to the solicitor. It was conceded on behalf of the defendant, that if the documents had been obtained or prepared at the instance and by the instruction of the

solicitor, they would be privileged, though not prepared by the solicitor himself, and the contention is, in fact, that there was no request beforehand by the solicitor that this information should be obtained. I am of opinion that would be an unsubstantial distinction. I believe there is no case directly in point, in which it has been held that the want of a request by the solicitor is fatal to the privilege claimed, but in *Friend v. London, Chatham, and Dover Ry. Co.*, 2 Ex. D. 437, 46 L. J. Ex. 696, COCKBURN, C. J., pointed out the correct principle. He said: "I think that the defendants' affidavit, which is unanswered, and therefore must be assumed to be true, brings this case within the exception to the general rule mentioned in *Bustros v. White*, 1 Q. B. D. 423, 45 L. J. Q. B. 642. The defendants intended that the medical men should make the examination merely with the view of informing their solicitor." That, I think, is the true principle, that if a document comes into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice, or of enabling him either to prosecute or defend an action, then it is privileged, because it is something done for the purpose

[* 323] *of serving as a communication between the client and the solicitor. I agree with BRETT, L. J., that except the transcript of the shorthand writer's note of the conversation between the chimney-sweep and the company's engineer, these are documents which clearly were prepared for the purpose of being laid before the solicitor of the company for obtaining his advice; and, as regards that document, though that is not stated quite so clearly, I think that in substance the transcript is also stated to have been prepared for the purpose of being laid before the solicitor. The fact that it was not laid before him can in my opinion make no difference, the object of the rule and the principle of the rule is that a person should not be in any way fettered in communicating with his solicitor, and that must necessarily involve that he is not to be fettered in preparing documents to be communicated to his solicitor. If such a distinction prevails, what is to be the rule where the application for production is made before a document is laid before the solicitor, but which it is intended should be laid before him? Is it, then, to be produced? If so, is it to be saved from production, because after the original application, but before the appeal is heard, the party has, in fact, laid the document before his solicitor? The distinction, in my opinion, is

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not one which can be supported. All these documents must be looked upon as having been prepared for the purpose of being laid before the solicitor, either for the purpose of enabling him to prosecute the action contemplated, or for the purpose of obtaining his advice on the question at issue in the action, and in my opinion are privileged. The appeal should therefore be dismissed.

Appeal dismissed.

ENGLISH NOTES.

The reason for the legal professional privilege is well stated by Lord BROUGHAM in *Greenough v. Gaskell* (1833), 1 My. & K. 103, where he says that "It is founded on a regard to the interests of justice which cannot be upholden, and to the administration of justice which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources, deprived of all professional assistance; a man would not venture to consult any skilled person, or would only dare to tell his counsellor half his case." See also the ruling case, and *per* Lord BLACKBURN, in *Kennedy v. Lyell* (1883), 9 A. C. 81, at p. 86.

The privilege exists only in the case of legal advisers: *per* MASTER OF THE ROLLS (Sir G. JESSEL), in *Wheeler v. Le Marchant* (1881), 17 Ch. D. 675, 50 L. J. Ch. 793. It extends, however, to their clerks acting as such: *Taylor v. Forster* (1825), 2 C. & P. 195; *Foote v. Hayne* (1824), Ryan & Moody, 165, Carr. & Pay. 545. It does not apply in the case of a medical adviser: *Re v. Gibbons* (1823), 1 C. & P. 97; *Lee v. Hamerton* (1864), 10 L. T. 730, 12 W. R. 975; steward: *Falmouth (Earl) v. Moss* (1822), 11 Price, 455; patent agent: *Moseley v. Victoria Rubber Co.* (1886), 55 L. T. 482; or pursuivant of the Herald's College: *Slade v. Tucker* (1880), 14 Ch. D. 827, 49 L. J. Ch. 644, 43 L. T. 49, 28 W. R. 807. But confidential communications to clergymen though not strictly privileged will be received with reluctance. *Broad v. Pitt* (1828), M. & M. 233; *Reg. v. Griffin* (1853), 6 Cox C. C. 219. See further, as to non-legal agents, *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644, 45 L. J. Ch. 449, 35 L. T. 76, 24 W. R. 624 (cited p. 598, *post*); *Westinghouse v. Midland Railway Co.* (1883), 48 L. T. 462; *Kerr v. Gillespie* (1844), 7 Beav. 572; *Storey v. Leunox* (1837), 1 Keen, 341, 6 L. J. Ch. 99 affirmed 1 M. & Cr. 525.

The privilege does not apply where the confidence was given before the relationship of solicitor and client was formed or after it has ceased.

Gainsford v. Grammar (1809), 2 Camp. 9, 11 R. R. 648. But a person who is not a solicitor will not be compelled to disclose a communication made to him under the mistaken belief that he is a solicitor. *Calley v. Richards* (1854), 19 Beav. 401.

Communications between a solicitor and his client relative to a fraud which they are contriving will not be protected; for the contriving of a fraud forms no part of the professional occupation of a solicitor. *Russell v. Jackson* (1851), 9 Hare, 387 at p. 392; *Follett v. Jefferyes* (1850), 1 Sim. N. S. 3; *Reynell v. Sprye* (1848), 11 Beav. 518. Where trustees were charged with making a fraudulent sale to one of themselves, communications between that trustee and another trustee who was said to have acted as solicitor for the first were held liable to production. *Postlethwaite v. Richman* (1887), 35 Ch. D. 722, 56 L. J. Ch. 1077, 56 L. T. 733, 36 W. R. 563.

On the same principle, communications made to a solicitor by his client for the purpose of being helped in the commission of crime will not be protected. *Reg. v. Cox* (1884), 14 Q. B. D. 153, 54 L. J. M. C. 41, 52 L. T. 25, 33 W. R. 396.

The privilege is that of the client, *Parkhurst v. Lowten* (1819), 2 Swanst. 194, 19 R. R. 63; *Herring v. Choberry* (1842), 11 L. J. Ch. 149; *Gresley v. Mousley* (1856), 2 Kay & J. 288, 9 Jur. (N. S.) 156; and may therefore be waived by him. *Procter v. Smiles* (1886), 55 L. J. Q. B. 527. But if he does not waive it no presumption adverse to him will arise, *Wentworth v. Lloyd* (1864), 10 H. L. Cas. 589; and a waiver as to some of the communications is not a waiver as to all. *Procter v. Smiles, supra*; *Lyell v. Kennedy* (1884), 27 Ch. D. 1, 51 L. J. Ch. 937, 50 L. T. 730.

Generally speaking, whenever a client consults a legal adviser in good faith, whether with a view to litigation or not, all communications which pass between them for the purpose of enabling the former to obtain the advice of the latter, are privileged. *Mostyn v. West Mostyn Coal Co.* (1876), 34 L. T. 531; *Turton v. Barber* (1874), L. R., 17 Eq. 329, 43 L. J. Ch. 468, 22 W. R. 438; *Minet v. Morgan* (1873), L. R. 8 Ch. 361, 42 L. J. Ch. 627, 28 L. T. 573, 21 W. R. 467. See also *per* KINDERSLEY, V. C., in *Lawrence v. Campbell* (1859), 4 Drew. 485. The communications must be confidential as well as professional. *Gardner v. Irwin* (1878), 4 Ex. D. 49 at p. 53; *Bursill v. Tanner* (1885), 16 Q. B. D. 1 at p. 5, 55 L. J. Q. B. 53, 53 L. T. 445, 34 W. R. 35; *Smith v. Daniell* (1874), L. R., 18 Eq. 649, 44 L. J. Ch. 189, 30 L. T. 752.

In these circumstances protection will be extended to documents prepared for that purpose by either the client or the legal adviser. Thus it appears from the ruling case that a statement of facts drawn

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up by the client or by his direction for submission to his solicitor is privileged. In *Lowden v. Blakey* (1889), 23 Q. B. D. 332, 58 L. J. Q. B. 617, 61 L. T. 251, 38 W. R. 64, which was an action for a libel alleged to be contained in an advertisement which the defendant had published, production was refused of a draft of the advertisement which before publication had been submitted to and revised by the defendant's counsel. Privilege will also be allowed to observations made by counsel on his brief. *Walsham v. Stainton* (1863), 2 H. & M. 1; *Nichols v. Jones* (1865), 2 H. & M. 588.

Where a document would not itself be privileged, the professional privilege will not attach to a copy of it. *Chadwick v. Bowman* (1886), 16 Q. B. D. 561, 54 L. T. 16; *Wright v. Vernon* (1853), 22 L. J. Ch. 447. But see *Lyell v. Kennedy*, *post*.

Where advice is sought in view of expected litigation, the privilege is still wider and may apply to communications and documents made by third parties. Its extent is sufficiently indicated in the rule which is borne out by the ruling case and other cases cited below.

The contemplated litigation must not be mere general litigation, but some definite action. *Westinghouse v. Midland Railway Co.* (1883), 48 L. T. 462. It need not however be the action in which the discovery is being sought. *Bullock v. Corrie* (1877), 3 Q. B. D. 358, 47 L. J. Q. B. 353, 26 W. R. 330; *Norden v. Defries* (1882), 8 Q. B. D. 508, 51 L. J. Q. B. 415, 30 W. R. 612.

As bearing more or less directly upon the rule the following cases may be referred to: *M^r Corquodale v. Bell* (1876), 1 C. P. D. 471, 45 L. J. C. P. 329, 35 L. T. 261, 24 W. R. 399, where privilege was held to attach to correspondence between the solicitor of one of the parties to an action and a third party for the purpose of ascertaining facts, with a view to the action which was afterwards brought and was then anticipated, and of guiding the party as to the mode of carrying it on. *Pacey v. London Tramways Co.* (1876), 2 Ex. D. 440 n., in which privilege was allowed to reports of medical officers sent by the defendant company, before action but after the claim was made, to examine the plaintiff who had been hurt in an accident, the plaintiff consenting to be examined at the solicitor's request in view of the intended litigation. And *Friend v. London, Chatham, & Dover Railway Co.* (1877), 2 Ex. D. 437, 46 L. J. Ex. 696, 36 L. T. 729, 25 W. R. 735, where a similar conclusion was arrived at, the medical examination of the plaintiff being made under a judge's order. In *Lyell v. Kennedy* (1884), 27 Ch. D. 1, 51 L. J. Ch. 937, 50 L. T. 730, it was held that although copies of or extracts from pre-existing documents are not *prima facie* privileged, yet a collection thereof will be privileged which has been made or obtained by a professional adviser, and which might afford a clue to the

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view of the case taken by such adviser. In *Learoyd v. Holifax Joint Stock Bank* (1893), 1 Ch. 686, 62 L. J. Ch. 509, 68 L. T. 158, 41 W. R. 341, protection was extended to a transcript of examination under section 27 of the Bankruptcy Act 1883, made to enable the trustee's solicitor to advise him whether the action should be brought; and in *North Australian Territory Co. v. Goldsborough* (1893), 1893, 2 Ch. 381, 62 L. J. Ch. 603, 69 L. T. 4, 41 W. R. 501, to depositions taken at the instance of the liquidator under sect. 115 of the Companies Act 1862. See also *Wheeler v. Le Marchant* and *Young v. Holloway*, p. 599, *post*.

The Court has also refused to allow production of surveyors' reports made at the plaintiff's request before and solely with a view to the action. *The Theodor Kroner* (1878), 3 P. D. 162, 47 L. J. P. 85, 38 L. T. 818, 27 W. R. 307.

Examples of cases in which privilege was held not to attach are to be found in *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644, 45 L. J. Ch. 449, 35 L. T. 76, 24 W. R. 624, in which a bill was filed against a banking company to compel them to replace a sum alleged to have been improperly transferred from one account to another at one of their branches. Before the bill was filed, but after litigation had become highly probable, the manager of the company telegraphed to the branch manager to send full particulars of the transaction; but the latter was not told that the particulars were to be submitted to lawyers for the purpose of obtaining advice. It was held that the letter sent in answer by the branch manager was not privileged. In *Bastros v. White* (1876), 1 Q. B. D. 423, 45 L. J. Q. B. 642, 34 L. T. 835, 24 W. R. 721, privilege was not allowed to letters written to the plaintiff in an action by his mercantile agent, and containing a mere volunteered opinion as to the plaintiff's chances of success founded on no more knowledge of the facts than was common to both parties to the action.

In *English v. Tottie* (1876), 1 Q. B. D. 441, 45 L. J. Q. B. 138, 33 L. T. 724, 24 W. R. 393, which was an action for not delivering goods according to contract, it appeared that the defendant shortly before the action had sent, to the agents of the company from whom he bought the goods, two letters from the plaintiff's solicitors relating to the claims made in the action, requesting them to obtain information, and that letters then passed between the defendant and the agents, some of them after the action was brought. It was held that the plaintiff was entitled to production of these letters. *Martin v. Butchard* (1877), 36 L. T. 732, decided that in an action for damages for improperly constructing a steam-tug, reports made by persons employed by the plaintiff to survey the tug for the purposes of the action were liable to

No. 6. — Southwark and Vauxhall Water Co. v. Quick. — Notes.

production. *Wheeler v. Le Marchant* (1881), 17 Ch. D. 675, 50 L. J. Ch. 793, 44 L. T. 632, was an action for specific performance of a contract to take a building lease, and it was there held that the defendants must produce letters which had passed between their solicitors and their surveyors except such as the defendants should state by affidavit had been prepared after the dispute and for the purpose of obtaining information, evidence, or legal advice, with reference to existing or pending litigation. *Young v. Hollouray* (1887), 12 P. D. 167, 56 L. J. P. 81, 57 L. T. 515, 35 W. R. 751, was an action in which the plaintiff sought to recall probate on the ground that the testator was not of sound mind and was subjected to undue influence by the defendants. After the commencement of the action, four anonymous letters relating to the matters in dispute were received, two by the plaintiff, one by her solicitor, and another by her counsel. It was held that the letters to the plaintiff must be produced, but that the others were privileged, for they must be taken to have been sent for the purposes of the action.

In *Huth v. Haileybury College* (1888), 4 Times Law Rep. 277, the affidavit claimed protection for communications from the infant plaintiff to his father and co-plaintiff, written at the latter's request and sent to him to be transmitted to their solicitors, but it was held that, as the affidavit did not show they had come into existence for transmission to the solicitors, they could not be treated as privileged.

Communications between the opposed parties to an action, or their solicitors, are not privileged. *Foakes v. Webb* (1884), 28 Ch. D. 287, 54 L. J. Ch. 262; *Griffith v. Davies* (1833), 5 B. & Ad. 502.

AMERICAN NOTES.

An attorney cannot be compelled to produce in evidence a paper left with him by a client in another case. *Lynde v. Judd*, 3 Day (Connecticut), 499.

Counsel entrusted by his client with papers relating to the action depending in Court is not obliged to produce them nor compellable as a witness to state their contents. *Jackson v. Denison*, 4 Wendell (New York), 558 (citing *Jackson v. Burtis*, 14 Johnson (New York), 391); *Crosby v. Berger*, 11 Paige (New York Chancery), 377; 42 Am. Dec. 117; *Durkee v. Leland*, 4 Vermont, 612, approving *Cromack v. Heathcote*, 2 Brod. & Bing. 4, as "the better law."

"There must be at least a controversy anticipated between parties in relation to the subject of which the communications were made to counsel or the documents intrusted to him." *Peck v. Williams*, 13 Abbott Practice Rep. 68; or a dispute, *March v. Ludlum*, 3 Sandford Chancery (New York), 35, a very learned examination of the English cases, citing *Greenough v. Gaskell*, 1 M. & K. 98 (Lord BROUGHAM), as giving "an able opinion examining the philosophy and true grounds of the privilege." That opinion is also specially approved in *State v. Douglass*, 20 West Virginia, 770, 781. Compare

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Bank of Utica v. Mersereau, 3 Barbour Chancery (New York), 528; 49 Am. Dec. 189.

Mr. Weeks (Attorney at Law), sect. 153, says, "to set the privilege in operation, the professional relation must exist, and some kind of professional employment is necessary." "The relation of attorney and client must exist, or the communication must have been made with a view to that relation." *Brown v. Matthews*, 79 Georgia, 1; *Romberg v. Hughes*, 18 Nebraska, 379; *Caldwell v. Davis*, 10 Colorado, 481; *Randolph v. Quindnick Co.*, 23 Federal Reporter, 278; *Tucker v. Finch*, 66 Wisconsin, 17; *State v. Cotton*, 87 Alabama, 75; *House v. House*, 61 Michigan, 69; 1 Am. St. Rep. 570. If the communication was made to the attorney in anticipation of employing him, it comes within the letter, spirit, and reason of the law of privilege. *Young v. State*, 65 Georgia, 525; *Nelson v. Beeker*, Minnesota (to appear); *Bacon v. Frisbie*, 80 New York, 394; 36 Am. Rep. 627; *Thorp v. Goewe*, 85 Illinois, 611; *Orton v. McCord*, 33 Wisconsin, 205; *Cross v. Riggins*, 50 Missouri, 335; *Bean v. Quimby*, 5 New Hampshire, 94. See a great number of cases cited in 19 Am. & Eng. Cyc. of Law. "Privileged Communication."

The American Courts do not seem to have gone so far as the principal case in protecting documents merely intended to be communicated.

Nos. 1, 2. — **Dunk v. Hunter**, 5 Barn. & Ald. 322, 323.

DISTRESS.

No. 1. — **DUNK v. HUNTER.**

(K. B. 1822.)

No. 2. — **MECHELEN v. WALLACE.**

(1836.)

RULE.

THERE is no right at common law to distrain unless there is an actual demise at a fixed rent.

And if the agreement to pay rent is upon a condition which is not performed, a distress cannot be justified.

Dunk v. Hunter.

5 Barn. & Ald. 322-327 (24 R. R. 390).

Distress. — Actual Demise.

A landlord has no right to distrain, unless there be an actual demise [322] to the tenant at a fixed rent; and, therefore, where a tenant was in possession, under a memorandum of agreement to let on lease, with a purchasing clause, for 21 years, at the net clear rent of £63, the tenant to enter any time on or before a particular day: *Held*, that this only amounted to an agreement for a future lease, and that no lease having been executed, and no rent subsequently paid, the landlord was not entitled to distrain.

Replevin, for taking and distraining plaintiff's goods in his dwelling-house, on the 15th March, 1821. Avowry that plaintiff, for one year, ending February 11th, 1821, held, as tenant to defendant, at the yearly rent of £63, payable quarterly, and that defendant distrained for one year's rent in arrear. Plea, first, that he was not tenant; secondly, that the rent was not in arrear. The cause was tried before BURROUGH, J., at the last Summer assizes for Sussex, when it appeared, that, on the 19th March, 1819, the following agreement was entered into between the parties. "Memorandum of *an agreement between Mrs. Ann Hunter, of [*323] Southwick, and David Dunk, of Brighton, butcher. Mrs.

No. 1. — *Dunk v. Hunter*, 5 Barn. & Ald. 323, 324.

Ann Hunter agrees to let on lease, with purchasing clause, for the term of 21 years, all that house and premises, St. James's Street present tenant Thomas Lawler; entering on the said premises by D. Dunk, any time on or before the 11th day of February, 1820, at the net clear rent of £63, per year, and to keep all premises in as good repair as when taken to (reasonable wear allowed), paying on entry £50 in ready cash, and the rent payable quarterly. The term for 7, 14, or 21 years, which term Mr. D. Dunk is to give one clear year's notice, before the expiration of either of the above term of years, if he intends to leave; if purchases before the expiration of the above term by D. Dunk, he is to pay on purchase 1000 guineas."¹ The plaintiff, under this agreement, paid the sum of £50 on the 10th February, 1820; but in consequence, as it was said, of some arrangement between him and the former tenant, he did not enter into the occupation of the premises till the 10th April following. In the March preceding, an application was made, and a lease tendered to the defendant to execute, but she declined to do so, saying she had found that she could not grant one. No rent had been paid by the plaintiff. The jury found a verdict for the defendant. Marryat, in last Michaelmas term, obtained a rule *nisi* for entering a verdict for the plaintiff, on the ground that the above agreement did not amount to a lease; and that, unless the plaintiff held under a demise, at a specific rent, the defendant had no right to distrain for rent-arrear. And [* 324] now *Gurney and Courthope showed cause. In this case, the plaintiff was tenant to the defendant, for the agreement amounted to a lease. Here the defendant agreed to let at a specified rent, and the plaintiff has paid the £50, and entered into possession under the agreement. He cannot, therefore, now say, that he did not hold at that rent. Then, the rent being due, the distress was legal. *Tempest v. Rawling*, 13 East, 18.

Marryat and Chitty, *contra*. There must be a demise at a specific rent, in order to entitle a landlord to distrain. He cannot distrain for a *quantum meruit*. The only remedy in such a case is, by an action for use and occupation. Then if so the question is, whether this is an agreement for a lease, or a lease; and clearly it is the former only. Here it specifies, that defendant agrees to let on lease with a purchasing clause; that shows a future lease

¹ This is a copy of the original memorandum, except that the spelling has been corrected.

must have been contemplated. The rent, too, must mainly depend, for its amount, on the beneficial clauses which were to be introduced into the future lease. *Hegan v. Johnson*, 2 Taunt. 148, is not distinguishable from the present case. As to *Tempest v. Rawling*, there is this distinction, that in that case there had been a payment of rent; which there has not been here.

ABBOTT, C. J. On looking through the whole of this instrument, which has obviously been framed by an unlettered person, it appears to me, that this is only an agreement preparatory to a demise, and not an actual demise. If it had been the latter, then the defendant * would have been entitled to distrain [* 325] for the rent. But it seems to me that it is not so. It has not any one of the forms of a lease. It begins thus, "Memorandum of an agreement; Mrs. Ann Hunter agrees to let on lease [which obviously means to execute a lease] with a purchasing clause for the term of 21 years, the tenant to enter on the premises at any time on or before the 11th February, 1820, &c." Now, looking at this instrument, I cannot infer when the tenancy was to commence or the rent to become due. The whole is left in doubt, and it is manifest that this was intended as a mere memorandum of an agreement to grant a future lease. Then the question is, whether the allegation in the avowry is sustained by the proof. A party has no right to distrain, unless there be a fixed rent agreed upon; if that be not so, the law gives him a remedy by the action for use and occupation. There can be no distress, unless there be a contract for an actual demise at a specific sum. Where the language of the instrument is such, as to make it a valid contract until something further be done, such instruments have, in some cases, after an actual enjoyment under them, been held to amount to an actual demise. But here, it does not amount to a demise at a certain rent, and therefore the defendant was not entitled to distrain, and cannot sustain the allegation in the avowry. The rule must therefore be made absolute.

BAYLEY, J. The allegation in the avowry is, that the plaintiff held the premises as tenant thereof to the defendant, by virtue of a demise thereof to him the plaintiff theretofore made. The first question is, whether this memorandum of an agreement amounts to a * demise for 21 years. If it does, then the [* 326] allegation in the avowry is made out in evidence. In the case of *Morgan v. Bissell*, 3 Taunt. 65, the rule is laid down thus, that although there are words of present demise, yet if you collect

on the face of the instrument the intent of the parties to give a future lease, it shall be considered an agreement only. It is clear in this case, that the memorandum of agreement was not intended to operate as a present demise. We cannot ascertain from the language of the instrument, when the term was to commence. There are no words of demise, nor any words from which a warranty of title may be implied, as would be the case if the word "grant" had been inserted. The meaning of the parties seems to have been, that if the defendant entered before the 11th February, the term was to commence from the period of such entry. Upon the whole, therefore, it seems to me, that the parties contemplated the execution of a future lease. Then if this was not an actual demise for 21 years, the party did not at all events hold at the annual rent of £63, and if so, the plaintiff by law could not distrain, the rent not being fixed. If a person bargains for a lease for 21 years, the rent is estimated upon an average for the whole term, and it may be of no benefit to the party whatever for the first year of his occupation. Here the rent of £63 is estimated on the terms of there being a lease granted, and at the time when the distress was made, no lease was granted, and no payment of rent had taken place. I think, therefore, that the plaintiff did not hold

the premises at any specific rent, and that the defendant's [* 327] only remedy was by an action for use and *occupation in which the amount of the rent would be a question to be left to the jury. This rule, therefore, must be made absolute.

HOLROYD, J. I am of opinion that the defendant was not entitled to distrain. This did not operate as a present demise, but was a mere agreement to let in future, and by a different instrument. And there is nothing to show, that it was the intention of the defendant to part with the premises until that instrument was executed. It is clear, that an agreement to grant a lease does not amount to a letting. Besides, in this case, there are subsequent words relative to the introduction of a clause for purchasing, which show, that the letting was to be by a particular instrument containing such a clause. And in addition to this, the stipulation as to the payment of £50 upon entry is quite inconsistent with this being an actual demise. For if it were an actual demise, the tenant would have had a right to enter immediately without paying that sum. I think therefore, that the defendant was not entitled to distrain, and that the rule must be made absolute.

BEST, J., concurred.

Rule absolute.

No. 2. — *Mechelen v. Wallace*, 7 Adol. & Ellis, 54 n.

Mechelen v. Wallace.

7 Adol. & Ellis, 54 n.—55 n.

Distress. — Conditional Agreement to pay Rent.

M. agreed verbally with W.'s agent to take a house of W., furnished, [54 n.] at £170 a year rent, for the house and furniture, payable quarterly, and in advance. The house was furnished only in part, but the agent said that it should be completely furnished; not, however, specifying any time. M. was let into possession within a month from the above treaty. After the expiration of a quarter, W. distrained for rent, the furniture not having been sent in as promised. M. brought trespass.

Held, that it was a question for the jury whether the agreement to pay rent was absolute, or on condition only of the furniture being sent in; that there was evidence upon which they might find it to have been conditional; and, therefore, that the distress was not justified.

Trespass for taking plaintiff's goods. Plea, Not guilty. On the trial before ALDERSON, B., at the Gloucester Spring assizes, 1836, it appeared that, the defendant having a house to let, the plaintiff, in May, 1835, entered into a negotiation with one Wood, the defendant's agent, for taking it; and it was agreed verbally between Wood and the plaintiff that the latter should rent the house, furnished, and pay, for the house and furniture, £170 a year, by quarterly payments, to be made in advance. At the time of this treaty the house was furnished in part only, but the agent said that it should be furnished completely, in a manner suitable to a lady's school. No time was fixed at which the furnishing was to be completed. The plaintiff entered on the 25th of May. The furniture was never put in. After the plaintiff had entered, a written agreement was tendered for his signature; but he (by letter to the agent) replied that he declined executing an agreement for a house which was not furnished, complained that furniture had not been sent in, and stated that he had relied upon the honour of Wood for this being performed. In September, 1835, the defendant distrained for £42 10s. The learned Judge left it to the jury to say, whether the payment of rent, as above stated, had been agreed for between the plaintiff and defendant absolutely, or on condition, only, of the house being properly furnished; and, in the latter case, whether or not the defendant had broken the condition. Verdict for the plaintiff.

Talfourd, Serjt., now moved for a new trial, on the grounds that the jury were misdirected, and that the verdict was against evidence. The agreement for taking the premises and paying £170 rent was a complete bargain; there was a time fixed from which the rent was to run, and the plaintiff had taken actual possession. The stipulation for furnishing, if it rested on anything more than the honour of Wood (which the plaintiff appears by his letter to have relied upon), could, at most, be only the subject of a cross-action. If this were otherwise, the defendant's claim of [55 n.] rent might be answered as long as a single chair or table was not perfectly completed and sent in. There was no evidence that the agreement for rent was intended to be conditional. *Regnart v. Porter*, 7 Bing. 451, was cited for the plaintiff at the trial; but there the rent was to commence at a future day, and the works engaged for by the landlord were to be done immediately; the performance of these, therefore, might justly be regarded as a condition precedent in point of time. In note (4) to *Pordage v. Cole*, 1 Wms. Saund. 320 a, Mr. Serjt. Williams lays it down that, "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act;" and many authorities are cited.

LORD DENMAN, C. J. If the performance of the furnishing was not left to the defendant's honour, the stipulation respecting it is part of the agreement. The observation upon it in the letter to Wood is only reproach to him. In my opinion there was evidence that the payment of rent was intended to be conditional; the house to be rented was to be a furnished house and no other.

PATTESON, J. I do not see how the contracts for rent and for furnishing can be separated. I think, with my Lord, that there was evidence of the agreement being conditional.

COLERIDGE, J., concurred.

(LITLEDALE, J., was absent.)

Rule refused.

ENGLISH NOTES.

The Statutes relating to distress are numerous, and for their effect and the cases immediately depending upon them, reference is made to Chitty's Statutes, Tit. "Landlord and Tenant." The cases selected in this work relate chiefly to the points depending on the common law.

The application of the rule of common law laid down by the principal cases is now (under the Judicature Acts) so far modified that a tenant in possession under an executory agreement for a lease is treated by the Courts as in all respects in the same position as if he held under a lease made pursuant to the terms of the agreement. So that if the agreement is such that the Court in an action for specific performance could order a lease at a fixed or minimum rent, the tenant in possession under the agreement may be distrained upon for that rent. *Walsh v. Lonsdale* (C. A. 1882), 21 Ch.D. 9, 52 L. J. Ch. 2, 46 L. T. 858, 31 W. R. 109. According to the judgment of the MASTER OF THE ROLLS (Sir GEORGE JESSEL) in that case, the rights and duties between the landlord and the tenant in possession under an agreement for a lease of which the Court would order specific performance are to be regarded by the Court as constituted under the Judicature Acts in the same way as if a lease had been made in accordance with the agreement. This view has been repeatedly followed and approved: by CHITTY, J., in *Allhusen v. Brooking* (1884), 26 Ch.D. 559, 53 L. J. Ch. 520, 51 L. T. 57, 32 W. R. 657; by FIELD, J., in *Re Maughan ex parte Monkhouse* (1885), 14 Q. B. D. 956, 958, 54 L. J. Q. B. 128, 33 W. R. 308; and by COTTON, L. J., in *Lowther v. Heaver* (C. A. 1889), 41 Ch.D. 248, 264, 58 L. J. Ch. 482, 60 L. T. 310, 37 W. R. 465. But it has been held by the Court of Appeal that this rule cannot be applied by a Court which has not jurisdiction to order specific performance. Such as a County Court, where the value of the premises exceeds £500. *Foster v. Reeves* (C. A. 1892), 1892, 2 Q. B. 255, 61 L. J. Q. B. 763, 67 L. T. 537, 40 W. R. 695.

It will be observed that possession by the person who is distrained against is essential to the doctrine laid down in *Walsh v. Lonsdale* (*supra*). And so, where a landlord has resumed possession of the premises under an order of the Court made in an action of specific performance brought by him against the party who agreed to take the lease, he was held not entitled to distrain for the arrears of rent accrued while that party had been in possession. *Murgatroid v. Old Silkstone & Dodsworth Coal & Iron Co.* (20 Nov. 1895), 65 L. J. Ch. 111, 44 W. R. 198.

By the common law the chattels distrained remained only as a secur-

ity in the hands of the distrainer. By the 2 Wm. & M. sess. 1, c. 5, power was given to sell the goods after the expiry of 5 days, now extendible at the request of the tenant to 15 days. 51 & 52 Viet. c. 21, s. 6. The power of sale was extended and further defined by 11 Geo. II. c. 19, s. 10.

The right of distress existed at common law only where there was a relation of tenure including the ordinary relation of landlord and tenant. It might also be expressly reserved as incident to a rent created by a deed or will, in which case the rent was called a rent-charge. Where a rent was reserved by a deed or will without expressly giving a power of distress it was called a *rent-seck*, and there was no power at common law to distrain for such a rent. *Bradbury v. Wright* (1781), 2 Dougl. 624. And although quit-rents arising from ancient tenures presumably created before the statute of *quia emptores* could be distrained for, the power of sale given by the Act of William & Mary (which only gave the remedy for rents due upon "any demise, lease, or contract") did not extend to them. But by the Act 4. Geo. II. c. 28, s. 5 the remedy of distress and sale was extended to cases of rent-seck as well as to rents of assize and chief-rents (commonly included in the expression quit-rents). The only other kind of rent known at common law is a rent-charge; which is a rent reserved by deed or will with express power to distrain for the same. The power of sale under 11 Geo. II. c. 19, s. 10 clearly applies to this as well as to any other rent which may be distrained for.

At common law rent cannot be distrained for after the determination of the tenancy although the tenant holds over. *Williams v. Stiven* (1846), 9 Q. B. 14, 15 L. J. Q. B. 321, 10 Jur. 804, and see recital in 8 Ann. c. 14, s. 6. But by the section of the Statute just referred to, the rent in arrear may be distrained for, provided (s. 7) the distress be made within six months after the determination of the lease and during the continuance of the landlord's title or interest and during the possession of the tenant. But, unless a new tenancy at an agreed on rent has been created by express agreement or can be implied by the payment of rent or otherwise, the landlord cannot distrain for rent accrued after the determination of the tenancy by expiration of the lease or by the landlord's notice to quit. The landlord has for such rent only his action for double value under the Statute 4 Geo. II. c. 28, s. 5, or for use and occupation. *Jenner v. Clegg* (1832), 1 Mood. & R. 213; *Alford v. Vickery* (1842), Car. & Marsh. 280. But the double rent under the Statute 11 Geo. II. c. 19, s. 18, where the tenant has given notice and yet holds over, may be distrained for. But this holds good only where the tenancy is determined by the tenant's notice, and does not apply where the tenant gives a notice not good in itself which is accepted

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by the landlord. *Johnstone v. Huddleston* (1825), 4 B. & C. 922, 7 D. & Ry. 411.

Distress may be made for the whole rent reserved on letting of furnished lodgings. For the rent issues out of the land, although it may be enhanced by the value of the furniture. *Newman v. Anderton* (1806), 2 Bos. & P. (N. R.) 224. But where there is no demise of the land the case is different; and where A., the owner of lace-machines, was permitted to place and work them in the factory of B., who for a consideration supplied power, it was held that B. could not distrain the looms for the stipulated payment. *Handcock v. Austin* (1863), 14 C. B. (N. s.) 634, 32 L. J. C. P. 252.

In *Daniel v. Stepney* (Ex. Ch. 1874), L. R., 9 Ex. 185, 41 L. J. Ex. 208, 22 W. R. 662, it was held by the Exchequer Chamber, reversing the judgment of the Court of Exchequer, that a power of distress given by agreement over lands other than those out of which the rent issues may be validly exercised by the landlord against an assignee of the lease who took with notice of the agreement.

AMERICAN NOTES.

Dunk v. Hunter is cited in 2 Wood on Landlord & Tenant, p. 1307; 5 Am. & Eng. Cyc. of Law, p. 706, and in 1 Taylor on Landlord and Tenant, sects. 42, 561; and its doctrine is supported by *Wells v. Hornish*, 3 Penrose & Watts (Penn.), 30; *Jacks v. Smith*, 1 Bay (So. Car.), 315; *Valentine v. Jackson*, 9 Wendell (New York), 302; *Dutcher v. Culver*, 24 Minnesota, 584; *Thrasher v. Gillespie*, 52 Mississippi, 840; *Dailey v. Grimes*, 27 Maryland, 440.

In *Marshall v. Giles*, Treadway (So. Car.), 637, the purchaser of premises at a judicial sale notified the tenant to remove at a certain time or pay one hundred dollars a month rent, but the tenant refused to do either. Held, that no distress would lie, for there was no agreement to pay a fixed rent.

In *Clark v. Fraley*, 3 Blackford (Indiana), 264, an agreement by the tenant to deliver one third of the corn to be raised on the premises as rent was held not to justify distress. But one third of the tolls of a grist-mill as rent may be distrained for. *Fry v. Jones*, 2 Rawle (Penn.), 11. Rent payable in anything susceptible of valuation may be distrained for. *Fraser v. Davie*, 5 Richardson Law (So. Car.), 59 (rent of fifty bales of cotton).

In the Indiana case it was said the rent was uncertain because it depended on weather, cultivation, and industry, but in the Pennsylvania case it was pronounced susceptible of certainty by accounting. In *Gilmore v. Ontario Iron Co.*, 22 Hun (New York Supr. Ct.), 391, an agreement to pay a certain sum per ton for ore removed from the premises and to remove at least a certain fixed amount yearly, was held sufficiently certain. See *Smith v. Colson*, 10 Johnson (New York), 91; *Wilkins v. Taliaferro*, 52 Georgia, 208.

In *Diller v. Roberts*, 13 Sergeant & Rawle (Penn.), 60; 15 Am. Dec. 578, it was held that distress would not lie for a second year's rent, the tenant hold-

No. 3. — *Brown v. Metropolitan, etc. Life Assurance Society*, 28 L. J. Q. B. 236.

ing over under an agreement that was not entirely applicable to the second year. "There must be a reservation of a certain rent."

Mechelen v. Wallace is cited by Mr. Wood, 1 *Landlord & Tenant*, sects. 47, 287, 1348, and in 1 *Taylor on Landlord and Tenant*! sect. 383.

The remedy of Distress is unpopular in this country. It was abolished half a century ago in New York. It never existed in New England. In North Carolina, Alabama, Ohio, Mississippi, Missouri, and Tennessee it does not exist. It prevails in Wisconsin, and to a certain extent in Iowa. As modified by the Statute of 4 Geo. II. c. 28, it prevails in about a dozen of the States. See 2 *Washburn on Real Property*, p. 290; 2 *Wood on Landlord and Tenant*, sect. 539; note, 15 *Am. Dec.* 584, citing *Dunk v. Hunter*.

No. 3. — *BROWN v. METROPOLITAN COUNTIES LIFE ASSURANCE SOCIETY.*

(Q. B. 1859.)

RULE.

THE assignee of a rent cannot distrain for arrears incurred previously to the assignment.

Brown v. Metropolitan Counties Life Assurance Society.

28 L. J. Q. B. 236–238 (s. c. 1 *Ellis & Ellis*, 832).

Mortgage. — Attornment. — Distress. — Arrears of Interest. — Rights of Assignee.

[236] Plaintiff mortgaged his interest in leasehold premises and his goods thereon to V. and others: V. and others by deed assigned the mortgage, the debt and arrears of interest then due, and all their rights under the mortgage, to the defendants. The mortgage deed contained a clause, "to the intent that the said V. and others, their executors and assigns, may have for the recovery of the interest accruing on the principal money secured, the same powers of entry and distress as are by law given to landlords for the recovery of rent in arrear, the said B, the plaintiff, doth hereby attorn and become tenant from year to year to the said V. and others, their executors and assigns, of the said premises, at the yearly rent of £125 to be paid on the 23rd of March and 23rd of September." Plaintiff remaining in possession of the premises and goods, the defendants, after the assignment to them, entered and seized goods for arrears of interest due before the assignment: — *Held*, in an action of trespass, that the defendants could not justify such seizure under that clause; that such clause operated as a creation of a tenancy, for the purpose of giving such rights of distress as would arise under such tenancy; that V. and others, having conveyed away their estate before the seizure, could not have distrained either at common law or under the statute of Anne.

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Supposing such clause could be construed as a mere personal license to V. and others to seize chattels, *semble*, that as such it could not be transferred by them; neither could they act under it at a different time and for a longer period than they would have had the right of distress as landlords, and the defendants could not justify the seizure as their servants.

The declaration in this action contained two counts; the first, for breaking and entering the plaintiff's premises and seizing his goods thereon; and the second, for an illegal and excessive distress.

The pleas were, first, not guilty; secondly, that the premises were not the plaintiff's; thirdly, that the goods were not the plaintiff's; fourthly, that the defendants did what was complained of by the plaintiff's leave.

Issue was joined on all these pleas.

The cause was tried, before WILLES, J., at the last Spring Assizes at York, when it appeared that the plaintiff, who was the lessee of the premises in question, had mortgaged his interest therein, together with his stock in trade, to Messrs. Vickers and others, by a deed of the 23rd of September, 1856. On the 18th of February, 1857, he mortgaged his equity of redemption to the defendants. On the 27th of October, 1858, the defendants paid off Vickers and others, and took an assignment from them of their mortgage, their debts and arrears of interest then due, with all powers and rights under the deed, and a power of attorney to ask for, demand, and recover in the usual form.

On the 20th of November following the defendants seized goods (the trespasses complained of) by way of rent in arrear, for arrears of interest due to the first mortgagees, none of it having accrued since the assignment to them. On these facts the learned Judge ruled that, under the deed of the 23rd of September, 1856 (the first mortgage), there was no tenancy authorizing a distress as for rent on the 20th of November, 1858; that the assignment from Vickers and others of that mortgage to the defendants did not *per se* give power to make such distress as for rent; and that the transfer did not *per se* give defendants power to seize the goods so as to entitle them to a verdict under the plea of leave and license.

The verdict was entered for the plaintiff, with £270 damages.

Quain (April 19) moved for a rule, calling on the plaintiff to show cause why this verdict should not be set aside, and a new trial had, on the ground of misdirection.

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The arguments and cases cited in support of the motion fully appear in the following judgment.

Cur. adv. vult.

[* 237] * Lord CAMPBELL, C. J., now delivered the judgment of the Court (Lord CAMPBELL, C. J., ERLE, J., CROMPTON, J., and HILL, J.). In this case the plaintiff had mortgaged certain leasehold premises to one Vickers and others, to secure £2500 and interest, payable on the 23rd of March and the 23rd of September in every year. The deed contained a clause by which, "to the intent that the said Vickers and others, their executors and assigns, may have for the recovery of the interest accruing on the principal money secured the same powers of entry and distress as are by law given to landlords for the recovery of rent in arrear, the said Brown doth hereby attorn and become tenant from year to year to the said Vickers and others, their executors and assigns, of the said premises, at the yearly rent of £125, to be paid on the 23rd of March and the 23rd of September." Vickers and others assigned to the defendants the mortgage and premises, and the mortgage debt and certain arrears of interest then due, with all powers of recovering the same, and with a power of attorney to ask for, demand, and recover in the usual form. At the trial, before WILLES, J., at York, the defendants, in order to justify the seizure of goods taken by them after the assignment for arrears due before the assignment, relied upon the provisions contained in the mortgage deed and the deed of assignment. The learned Judge held that they were not justified in this seizure. Mr. Quain applied for a rule for a new trial on the ground of misdirection; and admitting, for reasons not necessary to be stated, that he could not defend the seizure on the ground of any right to distrain, contended that the power was not a power of distress, but was a mere personal license to Vickers, and that under such license the defendants, acting on the deeds, could justify as the servants of Vickers. We are of opinion that the decision of the learned Judge was correct, and that there ought not to be any rule. We do not at all assent to the proposition that there was no tenancy, or that the power of distress was inoperative. The cases of *Chapman v. Beecham*, 3 Q. B. 723, 12 L. J. Q. B. 32, *Doe d. Snell v. Tom*, 4 Q. B. 616, 12 L. J. Q. B. 264, and *Walker v. Giles*, 6 C. B. 662, 18 L. J. C. P. 323, were referred to as showing that the clause in

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the mortgage deed must be construed as a license, and not as a power of distress, and that no tenancy was created. We do not at all agree to this proposition. In *Chapman v. Beecham* there was no demise or relation of landlord and tenant; but the mortgage contained a mere license to take the goods, as landlords do, for arrears of rent. The reference to the power of distress by landlords only showed how the goods were to be taken and dealt with. In *Doe v. Tom*, Lord DENMAN expressly says, however the clause of attornment operated, a right of entry was expressly given by the deed; and the Court most properly held the ejectment maintainable on that distinct right of entry, whether there was a tenancy or not. After the more recent case of *Pinhorn v. Sonster*, 8 Ex 763, 22 L. J. Ex. 266, with which we entirely concur, we think that the case of *Walker v. Giles*, can only be supported, if at all, on the grounds pointed out by Lord WENSLEYDALE in *Pinhorn v. Sonster*. The Court of Common Pleas, as observed by Lord WENSLEYDALE, thought the clause creating a tenancy and power of distress inconsistent with the peculiar provisions of the deed as to the contributions. In page 773, Lord WENSLEYDALE states, "as there is no inconsistency in this clause, we need not strike it out, as the Court of Common Pleas thought themselves compelled to do in *Walker v. Giles*;" and *Pinhorn v. Sonster* is an express authority that such a deed as the present operates as a creation of a tenancy, at a rent for which there may be a distress. Vickers, having conveyed away his estate before the seizure, therefore could not have distrained either at common law or under the statute of Anne. Even supposing that the present clause should be construed to give a mere license, and not a power to distrain, we think it impossible to say that Vickers could act under such license at a different time, and for a longer period, than he would have had the right of distress as landlord. There is not, as *in *Chapman v. Beecham*, an express power to seize [*238] and sell in the manner landlords do; but there is the mere creation of a tenancy, for the purpose of giving such rights of distress as would arise under such tenancy, and it would be directly contravening the intention of the parties to hold that this could be converted into a license to seize and sell, when all right as a landlord would have been at an end. The party may say, "I made myself tenant that you might have a right to seize and distrain as landlord, that is, while I am tenant and you are landlord; but I

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never intended to give you powers greater, or for a longer period, than a landlord would have." But even if this were a mere license to Vickers, we think the learned Judge right in saying, that as a mere license to seize chattels it could not be transferred. Mr. Quain hardly controverted this ruling; but he urged that if the pleadings were amended, which it was stated might be done if necessary, the defendants would justify as the servants of Vickers. The learned Judge thought that the deed did not enable them to do so; and if it were necessary to decide this point, we should probably be disposed to concur in his view of this part of the case. The license to seize goods is clearly a personal authority to be exercised by the licensee; and if an irrevocable power be given by him to the assignee of the debt, in such a case as the present it would be left to the assignee to judge in each particular case, whether the seizure should be made or not; and the personal authority of the original licensee to do the act, or command it to be done, would be gone. This seems to us, in effect, to amount to an assignment or transfer of a personal license. It is difficult to see how the particular trespass is the act of the original licensee, or is done for him, or as his servant, so as to make him the person committing the trespass. However this may be, we are clearly of opinion that Vickers had no right to seize by himself or his servants in the present case, and, consequently, that he could transfer none; and the rule, therefore, must be refused.

Rule refused.

ENGLISH NOTES.

Where there is a conveyance of the reversion, the remedy, by distress, of the assignor for rent due previously to the conveyance is also lost. *Thrèr v. Barton* (1569), Moore 94; *Dixon v. Harrison* (1670), Vaughan 36. In these two cases the tenant had attorned to the assignee, but the Statute of Anne (4 Ann. c. 16, s. 9) makes that immaterial.

And where a reversion vested in joint tenants has been severed by some of them conveying their shares, the right to distrain for rent due before the conveyance is gone. *Stacely v. Alcock* (1851), 16 Q. B. 636.

The Act 32 Hen. VIII. c. 37 gave executors and administrators the right to distrain for rents due to the deceased in his lifetime. But, though a lord of a manor may of common right distrain for his copyhold rents, *Laughtee v. Humphrey* (1596), Cro. Eliz. 521, the executors of a copyholder cannot distrain under the Statute. *Sands and Hempston's case* (1585), 2 Leonard. cxlii.

No. 4. — **Smith v. Mapleback**, 1 Term Reports, 441.

The point made in the principal case that if the power given by the deed to distrain was a mere licence to seize chattels it could not be assigned, is confirmed by *In re Davis; Ex parte Rawlings* (1888), 22 Q. B. D. 193, 37 W. R. 203.

AMERICAN NOTES.

At common law none but the lessor and his heirs or legal representatives can take advantage of a breach of covenant in a lease. *Norris v. Milner*, 20 Georgia, 563; *Smith v. Brannan*, 13 California, 107; *Dewey v. Williams*, 40 New Hampshire, 222; *Winn v. Cole's Heirs*, 1 Mississippi, 119; *Parker v. Nichols*, 7 Pickering (Mass.), 111; *Cross v. Carson*, 8 Blackford (Indiana), 138; 44 Am. Dec. 742; *Hooper v. Cummings*, 45 Maine, 359; *Cornelius v. Irins*, 26 New Jersey Law, 376.

In *Slocum v. Clark*, 2 Hill (New York), 475, it was held that the assignee of "all the rents remaining unpaid," without an assignment of the lease, does not carry the right of distress. "The transfer was therefore of a mere *chose in action*, which cannot carry with it the remedy by distress."

In *Keaton v. Tift*, 56 Georgia, 146, it was held that the assignee of a right to let certain premises and collect the rent had the power to distrain as against one who took a lease from him.

No. 4. — **SMITH v. MAPLEBACK.**

(K. B. 1786.)

RULE.

WHERE the original lessor of premises obtains possession of them under an agreement with an assignee of the original lessee under which the original lessor is to possess them for the whole term, and as the consideration for the transaction is to pay to that assignee an annual sum, this operates as a surrender of the term, and the stipulated annual sum cannot be distrained for in name of rent.

Smith v. Mapleback.

1 Term Reports, 441-446 (1 R. R. 247).

Lease. — Surrender for increased Rent. — Right of Distress determined.

Where a lease came into the hands of the original lessor by an agree- [441] ment entered into between him and the assignee of the original lessee.

"that the lessor should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent annually towards the good-will

No. 4. — *Smith v. Mapleback*, 1 Term Reports, 441.

already paid by such assignee," such agreement operates as a surrender of the whole term. The sum in the agreement is considered as a sum to be paid annually in gross, not as rent. And the assignee cannot distrain either for that or for the original rent; but he has a remedy by assumpsit for the sum reserved for the good-will.

This was an action of replevin. The defendant in his first cognizance, as bailiff of William Marmaduke Sellon, acknowledged the taking, &c.; stating that the plaintiff, on the 8th of January, 1786, and for one half year then last past, &c., held and enjoyed the said dwelling-house, in which, &c., as tenant thereof to William M. Sellon, under a demise to him thereof made, at the yearly rent of £40 payable quarterly, to wit on the 8th of October, 1785, the 8th of January, 1786, the 8th of April, 1786, and the 8th of July, 1786.

And, because £20 for half a year, ending on the 8th of January, 1786, were in arrear and unpaid from the plaintiff to William Marmaduke Sellon, the defendant, as bailiff, &c., acknowledged the taking, &c., for and in the name of a distress, &c.

The second cognizance stated that the plaintiff held under a like demise, as stated in the first count, at the yearly rent of £31 10s. payable quarterly as aforesaid, and because £15 15s. for half a year ending on the 8th of January, 1786, were in arrear, &c.

The third stated that the plaintiff held under a like demise, at the yearly rent of £40 payable quarterly on the four most usual quarterly days of payment, to wit, Michaelmas-day, 1785, Christmas-day, 1785, Lady-day, 1786, and Midsummer-day, 1786; and because £19 3s. 4d. for one quarter of a year, and the part of another quarter of a year, ending on the 25th of December, 1785, (the residue of the rent for the said last quarter having been before paid and satisfied to the said William Marmaduke Sellon) were in arrear, &c.

The fourth stated that the plaintiff held under a like demise, at the yearly rent of £31 10s. payable quarterly (as in the third cognizance); and because £15 1s. 6d. for one quarter and part of another were in arrear, &c.

The fifth, that the plaintiff held under a like demise, at the yearly rent of £31 10s. payable quarterly, at the four most usual days of payment; and because £7 4s. for part of one quarter of a year, ending on Michaelmas-day, 1785, were in arrear, &c.

The sixth, that the plaintiff on the 8th of January, 1786, and

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for one quarter of a year then last past and more, held the said premises as tenant as aforesaid, by virtue of a certain demise to *him thereof made, at the yearly rent of £31 [*442] 10s. payable on the four most usual days of payment; and because £7 17s. 6*d.* for one quarter of a year, ending on the 25th of December, 1785, were due and in arrear, &c.

Plea in bar, that the plaintiff did not enjoy the said dwelling-house, &c., under any such demise thereof made to him as the defendant in his first cognizance alleged; and that the sum of £20 in the first cognizance mentioned, was not, nor was any part thereof, in arrear. The like pleas to the second, third, fourth, fifth, and last, cognizance.

On the trial of this cause a case was reserved for the opinion of this Court.

The plaintiff, William Smith, being possessed of the premises for a long term of years, by indenture of lease dated the 25th March, 1783, demised unto Robert Swin all that messuage or tenement, &c., (the premises mentioned in the pleadings) from the day of the date of the said indenture for the term of eight years, at the yearly rent of £31 10s. payable quarterly on the four usual quarter days. Robert Swin entered and took possession of the premises under the said lease. By indenture dated 12th of April, 1785, Robert Swin, in consideration of £145 13s., assigned the premises to William Swin for the remainder of the term; who, afterwards, by indenture dated 6th July, 1785, assigned over to the said William Marmaduke Sellon. Sellon entered and took possession under that assignment. The plaintiff, William Smith, afterwards applied to Sellon to take the said premises: and the following agreement was entered into between William Sellon and Ann Smith, as agent for her husband the plaintiff. "Agreement between Mr. Smith and Mr. Sellon for The Three Jolly Sailors at Rotherhithe; Mr. Smith to have the house on the terms as mentioned in the lease, and to pay £8 10s. over and above the rent annually, towards the good-will, already paid by Mr. Sellon."

The plaintiff Smith took possession of the premises under the said agreement; and the premises described as The Three Jolly Sailors in the agreement, are the same premises demised by the lease of the 25th March, 1783, of which the plaintiff, William Smith, at the time of the agreement aforesaid had the reversion.

The defendant as bailiff of William Sellon on the 14th of January, 1786, took the distress for one quarter's rent.

The question for the opinion of the Court is, whether the defendant as bailiff to William Marmaduke Sellon had a right to distrain for any and for what rent?

[* 443] * Rous for the plaintiff. The question turns on the effect of this agreement; whether it operates as a surrender of the term, or whether it is to be considered as an under-lease?

This distress was illegal, because Sellon had no interest in the land at the time of making it. And it is perfectly clear that a lessor cannot justify taking a distress, unless he has some interest in the land at the time; for the title to distrain arises from the privity of estate, and ceases with it. It is an indulgence which the law allows to the owner of the land to compel payment of rent by the lessee during that time. So that even where a rent is reserved *ex nomine* during a term, no distress could at common law be taken after the expiration of that term. Co. Lit. 47; 1 Ro. Abr. 672. This doctrine is recognized by the Legislature in the statute 8 Ann. c. 14, which allows a distress to be taken within six months after the expiration of the term, provided the same tenant continues in possession. By the agreement entered into between the plaintiff and Sellon, the former was to have the possession of the premises; but with respect to the terms of that possession, they are to be collected only by a reference to the original lease, one of which is that the possession shall continue for eight years; then there is no interest remaining in Sellon which could entitle him to make this distress.

As to the rent; the plaintiff was to take the house by an express reference to the terms of the original lease, that is, by the payment of £31 10s. quarterly at the four usual days of payment; but the rent of £8 10s. for the good-will is to be paid annually at the expiration of each year, namely, on the 6th of July, and not by quarterly payments. Therefore the first payment of the £8 10s. was due subsequent to the time of the distress; and the parties could not intend to unite these two sums which were to be paid at different times and for different considerations. But supposing it could be collected that the intention of the parties was to reserve £8 10s. as a rent, yet distress was not incident to it, if no interest remained in Sellon.

This agreement therefore must operate as a surrender of the term. Lord COKE says that surrenders are favoured in law; and at common law a surrender of a lease by deed might be made by

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parol. Co. Lit. 338, 2 Rol. Abr. 499, l. 5. The only difference between a surrender by deed and by parol is occasioned by the statute of frauds.

It will be highly inconvenient and contrary to justice to allow the legality of this distress; because it will be to drive the lessor to his remedy over against the original lessee.

* Shepherd for the defendant contended that this agree- [* 444] ment did not amount to a surrender from Seldon to the plaintiff. Where there is any interest or even a possibility of interest reserved in the lessee, it cannot be taken to be a surrender. For where A., tenant for life, assigns to the reversioner for the life of the reversioner, he may distrain on him, on account of the possibility of his surviving the reversioner. So where a lessee either for life or years leases to the lessor reserving a day, it does not amount to a surrender. 1 Rol. Rep. 387. Where rent was reserved (though the whole interest passed from the lessee to the reversioner) that equally prevented its being considered as a surrender. Dyer, 251; 1 Vent. 272. A reservation may be good by contract though without deed. 1 Vent. 242. He admitted that no particular words were essentially necessary to constitute a surrender; and that it may be collected from the intention of the parties appearing on the instrument executed by them. Sheph. Touchst. 305. In the present case, it is impossible to say that it was the intention of these parties, as it is to be collected from the agreement, that this should operate as a surrender. It is to be considered only as an under-lease; for the defendant is to hold on the terms of the original lease.

As to the rent of £8 10s. being payable at a different time from that of the £31 10s., if it appeared on this instrument that it was the intention of the parties that these rents should be consolidated, it must be considered as payable at the same time as the other sum. In 4 Bac. Abr. 343 it is said, "Though there be no particular days mentioned in the deed for the payment of the rent, yet if the manner of such appointment will not fully answer the design of the contract, the law in such case will alter or transpose the words of the deed; because it is the great end of the law to execute all contracts, however unwarily or inartificially framed, according to the purport and true intention of the parties upon the whole deed." Here the intention of the parties is evident, and the Court will supply their defects in point of form. 2 Rol. Rep. 213;

Plowd. 171; Moor. 459; Cro. Eliz. 486. Though from the words of this agreement the rent of £8 10s. is to be paid annually, yet it is evident that the parties did not mean one annual payment; but that sum was to be paid annually by quarterly payments at the same time that the rent was reserved by the original lease. And the agreement is to pay £8 10s. annually, over and above the rent of £31 10s., which indisputably proves that the lessee was to pay so much per annum at the same time that the original rent is payable.

[* 445] * The cases which make a distinction between contracts by deed and by parol were before the statute 4 Geo. II. c. 28; because unless the lessor had a reversionary interest in him, he could not distrain; but the statute says that where there is a reservation of rent, the party, having a right by way of contract, has a remedy by way of distress. In *Poultney v. Holmes*, 1 Stra. 405, it is said, "Where the lessee demises all his interest, reserving rent, an action lies on the contract." That case was before the statute 4 Geo. II., by which distress is incident wherever a rent is reserved. Blackstone, J., in his Commentaries, 3 Bl. Com. 6, 7, says, the intention of the statute was to put all rents on the same footing.

As this agreement therefore was no surrender of the lease, because rent was reserved; as the rent of £8 10s. to be paid annually over and above the £31 10s. must mean so much to be paid *per annum* at the same times as the original rent was reserved; inasmuch too as an action would have lain on the contract before the statute 4 Geo. II., and since that time the party has a remedy by distress, Sellon had a right to distrain for the whole rent. But if the Court should be of a different opinion, at least he had a right to distrain for the rent in the original lease; there is an avowry for the quarter's rent; and the question reserved is whether he is entitled on either of these avowries.

Rous in reply was stopped by the Court.

ASHHURST, J. It is not necessary to determine whether this agreement amounts to a surrender of the whole interest, or is to be considered as an under-lease only: though if it were necessary, I should say it was intended that the premises should be assigned for the whole term. But even supposing it is not so, and that it was only intended to be a demise from year to year, we must necessarily give judgment for the plaintiff: because first, I am of

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opinion that the £8 10s. at all events was reserved annually, and not by way of rent; but was intended to be a payment of a sum in gross. For the plaintiff was to hold on the terms mentioned in the lease, and to pay £8 10s. over and above the rent annually reserved towards the good-will; that in my apprehension does not mean a sum to be paid as a rent, but a sum in gross.

But even if it were reserved as rent, yet it is reserved annually; therefore it could not be due till the end of the year, and the defendant had no right to distrain till that time. Then the year not being at an end, only a proportion of it could be due.

* The plaintiff in his plea in bar says the rent was not [* 446] in arrear; and it was not so; because if the original lessor were tenant to the lessee under this agreement, yet as having an interest in the premises, Sellon was to pay rent to the plaintiff. The consequence is, that the plaintiff has a rent in his own hands; that balances the rent claimed; and then there was nothing in arrear.

BULLER, J. I am satisfied that this was intended to be a surrender of the whole term. The lease came into the hands of Sellon by assignment, and Smith wished to have it again. And there is no colour to say that Smith only wanted it for a particular period of the term; for when the agreement says he shall have it on the terms of the original lease, it means for the whole term.

Then as to the £8 10s., that is the consideration on which the surrender is made, to be paid towards the good-will. Sellon had paid a sum of money in gross in order to get the assignment of the lease. Instead of taking back that sum which he had paid, he agreed that he would receive it back again by annual payments. As it is not expressed on the face of the agreement from what time the payment of the £8 10s. was to commence, it must be taken to mean from the time when the agreement was made. Supposing it paid in the middle of a quarter, it cannot be applied to rent; because it was to be paid for the good-will from the time of the agreement. In doubtful cases where the parties express themselves inaccurately, the Courts will expound their contracts according to their intention. And it is a maxim in law so to judge of contracts as to prevent a multiplicity of actions; therefore this must be taken to be a surrender, in order to prevent two actions instead of one. For if Sellon were to recover against Smith, the latter might recover upon the lease against the former, which

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would be absurd. And it is on that ground that the Courts have construed express words of covenant into a release. As supposing the obligee of a bond covenanted that he would not sue on it, the Courts say that shall operate as a release; for if it operated only as a covenant, it would produce two actions. So here, it being clear that Smith was to have the lease back again, it operates as a surrender; and Sellon cannot recover any more than the £8 10s. which is to be paid annually as a sum in gross; and therefore he is entitled to an action of assumpsit to recover that sum.

Postea to the Plaintiff.

ENGLISH NOTES.

The principle of the ruling case was applied in *Parmenter v. Webber* (1818), 8 Taunt. 593, 20 R. R. 575, in which it was held that an under-lease of the whole term operated as an assignment. See also *Beardman v. Wilson* (1868), L. R., 4 C. P. 57, 38 L. J. C. P. 91, 19 L. T. 282, 17 W. R. 54. It has long been settled law that where a lessee for years assigns his term he cannot distrain for the rent due by the assignee. *Anon. v. Cooper* (1768), 2 Wils. 375; *Preece v. Corrie* (1828), 5 Bing. 24, 2 Moore & Payne, 57, 6 L. J. (O. S.) C. P. 205; *Pascoe v. Pascoe* (1837), 3 Bing. (N. C.) 898. The principle is that the right of distress is by common law incident to the reversion. Where there is no reversion there is no such right. So a termor who lets to an undertenant cannot, after his own term has expired, enforce payment of rent by distress, although the undertenant still retains possession. *Burne v. Richardson* (1813), 4 Taunt. 720, 14 R. R. 647.

The effect by the common law of merger or surrender as regards the person entitled to the ulterior reversion is altered by 8 & 9 Vict. c. 109, s. 9, which preserves for the benefit of the next ulterior reversion all rights which but for the surrender, &c., would have subsisted. And by 4 Geo. II. c. 28, s. 6, where a new lease is granted on the surrender of an old one, the remedies for the recovery of rent under the old lease are preserved so far as the rent under the new lease does not exceed the former rent. So that in such a case the right to distrain on previous subtenants is preserved.

AMERICAN NOTES.

This case is cited in 2 Taylor on Landlord and Tenant, sects. 510, 516, 560, and in 1 Wood on Landlord and Tenant, sects. 98.

There must be a reversionary interest in the fee to justify distress, and a lease in fee, reserving rent, destroys that remedy. *Prescott v. De Forest*, 16 Johnson (New York), 159; *Woodhull v. Rosenthal*, 61 New York, 382.

Nos. 5, 6. — Pullen v. Palmer, 3 Salkeld. 207.

Assignment by lessee to lessor as security for a debt does not operate as a surrender of the lease. *Breese v. Bunge*, 2 E. D. Smith (New York Com. Pl.), 474; and so where the tenant having abandoned, the landlord relets at request of a surety of the tenant. *McKensie v. Farrell*, 4 Bosworth (New York Super. Ct.), 197. But otherwise where by a sealed writing the parties agree to a surrender and a submission to arbitration concerning the amount of compensation to be paid by the lessee, although no award was made or the submission was revoked. *Harris v. Hiscock*, 91 New York, 340.

No. 5. — PULLEN v. PALMER.

(1697.)

No. 6. — WHITLEY v. ROBERTS.

(EXCH. 1825.)

RULE.

ONE joint tenant may distrain alone; but he must avow or justify such distress in his own right and as bailiff for the others.

But tenants in common must avow separately; and each may distrain for his own share.

Pullen v. Palmer.

3 Salkeld, 207-208 (Trin. 8 Will. III.)

Joint Tenants. — Distress. — Avowry.

One joint-tenant may distrain, but cannot avow for whole rent in his own [207] right.

In replevin for taking several cattle, the defendant avowed in his own right, for that W. R. was seised in fee of, &c., and granted a rent-charge to A., B., and C., and ten more, who granted to the defendant and to twelve more; and that four of the said thirteen are since dead, and nine alive, of whom he is one; and that for one year's rent, due at such a time, he distrained. Upon a demurrer to this plea it was objected, that the defendant ought not only to justify in his own right, but that he ought likewise to make consuance as bailiff to the rest, who are living. *Et per* HOLT, Ch. J. — One joint-tenant may distrain, but he cannot avow solely, and therefore this avowry must abate, because it is always upon the right, and the right of this rent is in all of

 No. 6. — *Whitley v. Roberts, McClelland & Younge, 107.*

them; and therefore the Court cannot adjudge the right of the *retorn. habend.* to one alone; for which he (the defendant) ought to have made comsance, as bailiff to the rest; and this is like a replender, where the defendant may avow *de novo*. Tenants in common may join or sever in debt, but they must sever in avowry, for the reason before mentioned, (viz.) because it goes to the realty; and therefore, if three tenants in common distrain thirty beasts, one of them must avow for ten, the other for ten, and the third for ten more. But *per curiam*, The husband may distrain for rent due to his wife, and avow for it alone, because the right of the rent due is in him alone.

The essential difference between tenants in common and joint tenants is, that tenants in common held their lands either by several titles or several rights, but joint tenants hold them by one title and by one right; but there is no difference between them as to the possession, and the manner of taking the profits.

Tenants in common were not compellable at common law, before the statute, to make partition, no more than joint tenants; and *per* HOLT, Ch. J., in suing out a writ of partition, the party never shows whether he is a tenant in common or joint tenant.

Whitley v. Roberts.

McClelland & Younge, 107-119.

Joint Owners. — Distress.

[107] Land was demised by four persons (whose original title did not appear), at one entire rent, to be divided, and paid separately, in equal portions; and one of the four distrained upon the tenant for her own share of the rent. While her bailiff was in possession, the defendant, a churchwarden and overseer of the poor, having notice of the existing distress, distrained for a poor's rate, carried away, and sold, within four days, part of the property distrained upon, not leaving sufficient to satisfy the first distrainer's demand. This was done by the defendant under color of a warrant of magistrates commanding him to make a distress upon the goods of the tenant, and to sell the same, unless the rate and charges were paid within four days. *Held*, 1st, that the first distress was regular, for whatever might have been the interest of the landlords as between themselves, as between them and the terre-tenant they were tenants in common, and entitled each to a separate distress. 2dly. That the defendant was not within the protection of the 21 Geo. II. c. 41, s. 6, which requires a previous demand of the perusal and copy of the warrant, for although the strict right of property of the terre-tenant, in the goods, had not been altered by the first distress, and, therefore, the mere seizure of them was in obedience to the warrant, yet that seizure

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should have been made, subject to the pre-existing burthen upon the goods; but not having been so made, all the overseer's subsequent acts exceeded his authority; and, therefore, an action on the case was maintainable by the landlady to recover from him the portion of rent left unsatisfied.

Case. The first count of the declaration stated that plaintiff, to wit, on &c., had, by J. Williams, her bailiff, seized and taken, as a distress for £17 11s. 9d. arrears of rent then due to her from E. Jones, for premises demised to him, divers, to wit, fifty acres of wheat, growing upon five closes, part of the said demised premises, and * afterwards cut and gathered the [* 108] wheat, it being then ripe, and kept and retained it in her possession as such distress, &c. Yet that defendant rescued, seized, took, and carried away the said wheat, whereby plaintiff has been greatly delayed in the recovery of the rent, and deprived of the means of obtaining satisfaction thereof, and of the costs, and is likely to lose the same. The second count stated that plaintiff had made the distress by J. W., according to the form of the statute, yet, &c. The third count stated that plaintiff impounded the wheat upon the closes where it had grown, yet that defendant broke the pound, &c. There was a fourth count in *trover* for one hundred cart-loads of wheat, in the straw, value £30. The defendant pleaded, 1st, the general issue; 2nd, a justification, viz., that defendant as one of the churchwardens, and, as such, one of the overseers of the poor of the parish of St. Asaph, (in which the premises were situate), seized, took, and carried away the said wheat, and wheat in the straw, by, and under the authority of one Act of Parliament, made in the reign of Queen Elizabeth, 43 Eliz. c. 2, for the relief of the poor, according to the tenor and purport of the said act. 3d, That defendant was a churchwarden, and as such, an overseer, &c., and as such, did the several acts, &c., concluding as the second. The plaintiff took issue on the first plea; replication as to the second and third, *de injuria*, &c., and issue thereon. The cause was tried at the Summer Great Sessions, of 1824, for Flintshire, before C. WARREN, Esq., C. J. It was proved that the premises demised belonged to the plaintiff, and three other persons. They were let by parol agreement to E. Jones, the tenant, by a Mr. Brown, one of those persons, at one entire rent of £94 per annum; but the rent was to be divided, and paid to the four landlords separately, in equal portions. Two distresses had * been made on [* 109]

Jones, in January, 1823, one for the plaintiff, and Brown, jointly; the other for another of the landlords; but the sums respectively due were paid to each party. Another separate distress for rent due at the Lady-Day preceding, was made for the plaintiff, on some standing wheat, concurrently, with one for Brown, on the 15th September, 1823. And this second distress of the plaintiff gave rise to the present action. On the 19th the defendant came with two carts, raised the gates of the fields, which were locked, off the hooks, and seized, took away, and sold within four days, thirty-six shocks of the corn, which had been cut by the parties in possession, under a magistrate's warrant of distress, for £7 7s., being the amount of an assessment for the relief of the poor, on the tenant, as an inhabitant and occupier of the parish. The bailiff had told the defendant, before the seizure, that he had distrained on the fields for the plaintiff and Brown. The rest of the wheat distrained upon was sold by the plaintiff's attorney; and the produce of the sale, after deducting the expenses of the harvesting, and the distress, sale, &c., was only £11, which remained in his hands to be paid over. This was the plaintiff's case. When it was closed, the magistrate's warrant of distress (which was directed to the defendant, as one of the overseers of the parish, commanding him to distrain the goods of E. Jones, and if the sum assessed and the reasonable charges should not be paid within four days, to sell the distress, retain the assessment, and the charges, and return the overplus on demand), was put in and read for the defendant, — upon which, Temple, C., for that party submitted, that the plaintiff ought to be nonsuited, upon two grounds: 1st. That the plaintiff had shown that she had no right to make this distress; there was a joint demise; the rent therefore was not divisible, and the distress ought to have been made by all the landlords: 2nd. Under the statute 24 Geo. II. c. 44, s. 6, it having been proved that the defendant had acted under [* 110] the * warrant of magistrates, of the perusal and copy of which no demand had been made, and refused. The case was left, upon the evidence of the plaintiff, to the jury, who found a verdict for that party, for £6 11s. 9d.; but the Court (pursuant to the statute 5 Geo. IV. c. 106, which gave power to the Court of King's Bench, Common Pleas, and Exchequer, in certain cases, to grant new trials of causes, which have been commenced and been tried in the Court of Great Sessions in Wales), gave the

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defendant's counsel leave to move to set aside the verdict on both or either of the above grounds, and to enter a nonsuit.

Temple, C., had obtained a rule for that purpose in the last term, against which, Taunton, W. E., Peake, S., and Daniel, now showed cause.

*1st. The evidence does not clearly show the exact [*111] nature of the four landlords' interests; but so far as appears by it, they were tenants in common, and each had a separate interest. The demise of the premises was at one entire rent; but there was a separate and distinct reservation of one-fourth of the rent to each; therefore each had a right to distrain for his own proper portion. *Harrison v. Barnby*, 5 T. R. 246 (2 R. R. 584) shows that a terre-tenant, holding under two tenants

*in common, cannot pay the whole rent to one, after [*112] notice from the other not to pay it. Supposing the demise to have been joint, yet the subsequent agreement would operate by relation, and give several interests. Bacon's Abr. Tit. "Replevin," K. But if it were certain that a joint rent had been reserved to the landlords in entirety, yet the distresses might have been separated. This is supported by Lord HOLT's authority, in *Pullen v. Palmer*, (p. 623, *ante*) 3 Salk. 207, where his Lordship said, that "one joint tenant may distrain, but cannot avow separately." It follows, that the plaintiff's distress was lawful. 2dly. That being so, the defendant is not within the protection of the 6th section of the statute 24 Geo. II. The provisions of that statute do not apply to any other case than where the officer has acted in obedience to the warrant, and the magistrate would be liable if the act done were illegal. That was decided in *Money v. Leach*, 3 Burr. 1742; and *Bell v. Oakely*, 2 M. & S. 259 (15 R. R. 238), *Milton v. Green*, 5 East, 233, 1 Smith, 402, and all the subsequent cases proceed upon the same principle. In this case the warrant directed the defendant to seize the goods of Jones, but he seized goods which were not his, and therefore was a wrong-doer; the corn had been previously distrained upon, and was then *in custodiâ legis*. Jones had then only a qualified right of property; he had no right of possession to the wheat. That was in the persons who had distrained; (HULLOCK, B., observed that the contrary had been settled in a very famous case, *Ree v. Cotton*, Parker, 121, 8 R. C. 181). However that may be, the defendant was only commanded to take those goods of which Jones

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had the absolute right of property, and also the right of possession; those goods which were unfettered by the claim of any third person: but Jones's right of property in the corn was to a certain degree taken away; he would not have been entitled to [*113] take possession *of it himself, nor to have maintained trover for it. The party injured must have a remedy against somebody, *Parton v. Williams*, 2 B. and Ad. 330;¹ the magistrates cannot be answerable, for the warrant was perfectly regular, and the demand of a copy of it would not have given an action against them. It might be argued from *Parton v. Williams*, that if the defendant believed he was acting *bonâ fide* in obedience to the warrant, when he seized the corn, he would have been protected by the statute; but in this case he was told what had occurred, and warned of the consequences, and he insisted on proceeding. His conduct, therefore, was not the effect of ignorance or inadvertence, but of wilful perseverance. In the course of the argument *Harper v. Carr*, 7 T. R. 270 (4 R. R. 440), was mentioned to show that the statute extended to churchwardens acting within the line of their duty.

Temple and Corbett, in support of the rule, insisted, in reference to the first point, that it had been taken for granted at the trial, that the landlords were co-parceners, and that made a very material difference in the case. Putting the first distress out of the question (the Court had intimated that it could not be supported), and taking the case as it appeared upon the evidence, the plaintiff's second distress was illegal. The demise was of one term at one entire rent, and that rent could not be split into four, so as to give four separate distresses, which would be oppressive in the extreme. But it was put upon the record that the plaintiff had distrained for herself alone, while there was a distinct distress made at the same time for another of the landlords. There-

fore the plaintiff did not bring herself within the rule of [*114] law, on which alone a *distress by her could be sustained,

which was, that a distress might have been made by one in the name of all the rest. But if that were held otherwise, then, on the second ground, the action was not maintainable, for the defendant was entitled to the benefit of the statute. The statute was passed for the protection of officers acting *bond fide* in the performance of their duty, and this officer was so acting.

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Under the warrant he was bound to take all the property of Jones, and it was not averred by the record that he did more, for the corn still continued to be his property. (HULLOCK, B. There is another objection to his conduct; the warrant directed him to distrain the goods; and if the rate were not paid within four days, to sell them; but he seized, took them away, and sold them *uno flatu*.) At all events the question was so nice and difficult as to bring him within the policy and meaning of the act. This differed from all the cases cited on the other side, inasmuch as it was not one of wilful wrong, or of a clear deviation from the command of the warrant, which alone excluded the officer from the protection given by the law. To hold this officer liable to the action would be a peculiar hardship on him, because, had he refused to obey the warrant, he would have been liable to an indictment for his disobedience, even if it turned out that the distress would have been in some respects illegal. They cited *Price v. Messenger*, 2 Bos. and P. 158 (5 R. R. 559).

ALEXANDER, C. B. It appears to me, that this rule must be discharged. Two questions have been argued. 1st. Whether the original distress was proper at all; whether, from the situation of the parties, any one of the persons under whom the land was held, was entitled to make a distress for the portion of rent due to him. There is no evidence with respect to their title. But there is no *doubt, that in reference to the [*115] tenant, they must be taken to have been tenants in common, for the tenant made a specific contract to pay the rent to them in four parts, and that contract had been previously acted on. Therefore, upon whatever terms they may have taken the estate, as between themselves, as between Jones and them they must be considered as tenants in common. Consequently, it seems clear, that the distress was proper. The second question raised, was, whether this defendant is entitled to the benefit of the act of Geo. II., and whether the right of action is not barred, in consequence of the plaintiff having omitted to demand a copy of the warrant under which the defendant acted. Now I am satisfied from the cases, that unless it be proved at the trial, that the act complained of was done in obedience to the warrant, the officer is not within the protection of the statute; and it seems to me that this officer could not have acted so, because the warrant required him to distrain the goods of Jones, and sell them within four days,

unless the sum assessed were paid, and to return the overplus on demand. But in the state in which things then were, he had no right to seize the property as the goods of Jones, because there were other persons entitled to the benefit of it by a prior title. He appears to have been apprised of the actual circumstances, but he nevertheless took away a part of the wheat and sold it. He had no right to do so, and he exceeded his authority; for the warrant applied to those goods only in which Jones was particularly and solely interested.

GRAHAM, B. I agree with my LORD CHIEF BARON. With respect to the first part of the case, we cannot look into the title further than as it is shown by the evidence, and on that, nothing is more distinct, than that the interest taken by the landlords under the contract with Jones, was that of tenants in common. The distinction between tenants in common and joint tenants [*116] is very plain, and *there is good reason for it. Whatever may be the number of joint tenants of an estate, no one of them has a right to any individual part of the estate, or the rent, because each holds *per my et per tout*, and there is but one complete title in all. But the case of tenants in common who have unity of possession only, is quite different, and when one tenant in common distrains, he is not required to distrain for the others, all of whom may have been paid the portions to which they are separately entitled. In considering the second question, I was at first a little doubtful, but my doubts have been removed. The statute has said that the officer shall be protected in all cases where he acts merely ministerially, and the Court would certainly wish to adopt the intention of the legislature. But in holding the defendant liable in this case, they impose no hardship on him. The magistrates not being aware of the landlady's distress, properly issue their warrant to the overseer to take the goods of E. Jones. The overseer comes upon the property, and discovers the obstruction to the execution of the precept. What duty is then laid upon him, beyond the exercise of an ordinary discretion. Though the act of distress had not changed the property, yet it had qualified it so, that the chattels were not to be touched as the property of the tenant. They were then in the custody of the law; and that was enough to excite caution in the most inexperienced man living. A prudent man would have gone immediately to the magistrates, and acquainted them with what had occurred;

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or he would have waited till the prior claim had been satisfied, and then taken the overplus if there were any; but, at once, he wrests the corn out of the possession in which it was, and carries it away. Under these circumstances, I think, that from his wilful conduct, he has taken the responsibility upon himself, and abandoned the benefit he might otherwise have derived from the statute.

GARROW, B., concurred.

*HULLOCK, B. This rule was obtained upon two [*117] grounds: with respect to the first, I think the Court can only look to the evidence given before the Judge, by whom the case was tried; it would not be warranted in examining into the origin of the title. Now it appears by the evidence of the tenant, that the taking was from these parties severally, and therefore the defendant would be estopped from saying, that the plaintiff was one of four joint tenants, and had mistaken her course. If there had been any mistake upon that part of the case, the question arising upon it would not be a proper one for the consideration of the Court, but ought to have been left to the jury. If there were any doubt upon it now, I should be of opinion that the case ought to go down again, but it is idle to imagine it. Then if they are to be considered as tenants in common, *Harrison v. Barnby* is decisive that one such tenant may do as the plaintiff has done; and *Cutting v. Derby*, in the 2nd Blackstone, 1077, is a much stronger case. With respect to the other ground, I apprehend it to be clear that to entitle a party to the demand of the copy of the justice's warrant, he must show that he acted in obedience to it. The question is, whether this defendant did so. The act provides by the 6th section, that no action shall be brought against any constable, headborough, or other officer, for anything done in obedience to any warrant, under the hand or seal of any justice of the peace, until demand hath been made, or left at his abode in writing, of the perusal and copy of such warrant, and the same hath been refused, or neglected for the space of six days. In *Nutting v. Jackson*, E. 13 G. III. Bull. N. P. 24, this species of officers was held to be within the act. In some of the cases cited, the party made a mistake in the person of the individual against whom the warrant was directed, and that was held to be such a deviation from the words, as would exempt the magistrate from any liability. Did this *man seize the property of E. Jones at [*118]

the time of the seizure? I think he did; that was very much gone into in the case of the *King v. Cotton*. There the question was, whether goods distrained for rent were liable to an extent, and the point arose, whether the property of the owner of the goods was divested by the distress. C. B. PARKER, in his judgment (p. 121), says, "the distrainer neither gains a general nor a special property, nor even the possession, in the cattle or things distrained; he cannot maintain trover or trespass; for they are in the custody of the law, by the act of the distrainer, and not by the act of the party distrained upon." And again, quoting the language of FOWICKE, C. J., of the C. P., "Mich. 20, H. VII. fol. 1, pl. 1. The distrainer hath neither property nor possession in the distress, for the pound is an indifferent place between them, and the party is only restrained from the use of the distress, till payment of the rent; and if a stranger takes the goods distrained out of the pound, the lord shall only have a *parco fracto*: and in the same case the tenant shall have an action of trespass, for the property remains in him; and it is not like a pledge, for he has a property for the time." Abr. Bro. Property, 52. A distress then causes no alteration of property; and thus far we may proceed with safety, that the overseer was warranted in making that seizure, although the goods were distrained and *in custodiâ legis*. But then was he warranted in selling them? I think not. It must be understood, that this was a warrant, either authorizing him to seize such things only as were the unqualified, unincumbered property of Jones; or if it did authorize him to take any other, it would be to take them *sub modo*, and liable to the burthen that was upon them. The ground of the action is the taking away the goods, which amounts to a rescue. It does not appear that they were disposed of in conformity with the warrant. They were seized on the 19th, and carried away on the instant and sold; in order to show a complete [*119] obedience to the precept, it should have been *proved, that the rate assessed was not paid within four days,—that the property was then sold, and the surplus returned to Jones. In *Bell v. Oakely*, the party was commanded to enter into a certain place, and seize property; he did do so, but not in the manner directed, and he was held not to be justified. If this officer had seized the goods, and held his hands for a few days, until the former distrainer had either resolved not to sell, or that he might receive the overplus of a sale, to which he would have had a right,

Nos. 5, 6. — Pullen v. Palmer; Whitley v. Roberts. — Notes.

his seizure would have been justifiable. But not having done so, I consider all his acts subsequent to the seizure to have been beyond his authority, and that he is liable to this action, because he did not act throughout in obedience to the warrant, which must be construed according to the subject-matter. It is an answer to the argument of his having literally obeyed the order, that his obedience did not come down to the time of the sale. Therefore I agree with the rest of the Court, that this rule should be discharged.

Rule discharged without costs.

ENGLISH NOTES.

One joint tenant may, without the assent of the others, appoint a bailiff to distrain for the rent due to all the joint tenants. *Robinson v. Hoffman* (1828), 4 Bing. 562; and *per Jervis, C. J.*, in *Morgan v. Parry* (1855), 17 C. B. 334, 342. In *Robinson v. Hoffman*, it appeared that one of the joint tenants, being applied to, to authorize the distress, declined to do so. *BEST, C. J.*, considered it unnecessary to decide what would have been the effect of an express dissent on the part of one of the joint tenants; but said that his declining to authorize the distress did not amount to a dissent. It is difficult to say what would amount to an express dissent.

One of two joint tenants may demise his part to the other with the usual incidents of a reversion and right to distrain. *Cowper v. Fletcher* (1865), 1 B. & S. 464, 34 L. J. Q. B. 187.

A rent-charge may be divided amongst several persons as tenants in common so as to make the tenant of the land liable to the rent-charge liable to several distresses by the sharers in the rent. *Ricis v. Watson* (1839), 5 M. & W. 255. And if the tenant holding under tenants in common pays the whole rent to one after notice from the other not to pay it, he may still be distrained upon by the others for his share. *Harrison v. Barnby* (1793), 5 T. R. 246, 2 R. R. 584.

AMERICAN NOTES.

These cases are cited and their doctrine is approved in 1 Taylor on Landlord and Tenant, sects. 569, 760, and in Wood on Landlord and Tenant, pp. 165, 175, 1308. This doctrine is also stated in 5 Am. & Eng. Cyc. of Law, p. 707, citing *Robinson v. Hoffman*, 4 Bing. 562, *Harrison v. Barnby*, 5 T. R. 246, and *Whitley v. Roberts*. A tenant in common may distrain for his share of the rent. *Grassmeyer v. Beeson*, 18 Texas, 753; *De Coursey v. Guarantee, &c. Co.*, 81 Pennsylvania State, 217.

No. 7. — *WOOD v. TATE*.

(1806.)

RULE.

THE bailiff or agent of a corporation may distrain for a rent under a demise made by an agent on behalf of the corporation, if rent has been paid under the tenancy so created.

Wood v. Tate.

2 Bos. & P. (N. R.) 247-257 (9 R. R. 645.)

[247] *Demise by Corporation. — Distress by Agent.*

By indenture between A., B., and C., bailiffs, and D., E., and F., aldermen, with the assent of the burgesses of the borough of M. of the one part, and J. S. of the other part: the said bailiffs, aldermen, and burgesses demised lands to J. S. for years, to be holden of the said bailiffs, aldermen, and burgesses: and the deed was executed by A., B., and C., D., E., and F.: but not sealed with the corporation seal; J. S. having paid rent to the bailiffs as chief officers of the borough: *held*, that their servant might make cognizance for taking a distress under a demise by the corporation, notwithstanding a notice had been given by the aldermen (one of whom was a party to the indenture) to pay the rent to them; for the payment of rent to the bailiffs admitted a tenancy from year to year under the corporation.

Replevin. The defendant made cognizance first as bailiff of the bailiffs and burgesses of the borough of Morpeth, in the county of Northumberland, acknowledging the taking the plaintiff's goods and chattels as a distress for £3 5s. for half a year's rent ending on the 29th May, 1803, due from the plaintiff to the said bailiffs and burgesses for the messuage or tenement and yard or parcel of

land adjoining thereto, in which, &c., with the appurtenances held and enjoyed by the plaintiff as tenant * thereof,

to the said bailiffs and burgesses, by virtue of a certain demise thereof to him, the said plaintiff, theretofore made at and under the yearly rent of £6 10s. payable half-yearly, to wit, Whitsuntide and Martinmas in every year, by even and equal portions. To this cognizance the plaintiff pleaded in bar, 1st, That he did not enjoy the said messuage or tenement and yard or parcel of land in which, &c., with the appurtenances, as tenant

No. 7. — Wood v. Tate, 2 Bos. & P. (N. R.) 248, 249.

thereof to the said bailiffs and burgesses of the borough of Morpeth aforesaid in manner and form as the said defendant had in his said cognizance alleged. 2dly, *Riens en arriere*. 3dly, That the said defendant was not bailiff to the said bailiffs and burgesses of the borough of Morpeth, and did not take the said goods and chattels in the declaration mentioned as bailiff of the said bailiffs and burgesses of the borough of Morpeth aforesaid in manner and form as the said defendant in his cognizance aforesaid had alleged.

On each of these pleas in bar an issue was joined. There were other cognizances and pleas, and issues joined thereon.

This cause came on to be tried before Mr. Justice CHAMBRE at the last assizes for the county of Northumberland, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:—

The burgesses of the borough of Morpeth, in the county of Northumberland, are a corporation by prescription, by the name, style, and title of The Bailiffs and Burgesses of the Borough of Morpeth, in the County of Northumberland, consisting of two bailiffs and other officers, and an indefinite number of burgesses or freemen. The bailiffs and certain other officers of the corporation are elected and sworn into their respective offices annually, — viz., at the Court-leet and Court-baron held on the first Monday next after Michaelmas day. The bailiffs are the *chief [*249] officers of the borough; they call all corporate meetings or guilds, and preside at the same: they alone collect and receive the rents and revenues of the corporation. There are within the said borough seven companies or fraternities, consisting of an indefinite number of burgesses and free brothers. The free brothers are not burgesses, or freemen of the borough, but are merely members of their respective companies, and it is from them the borough is supplied with burgesses or freemen; but when elected and admitted burgesses or freemen, they still continue members of their respective companies. Each of these seven companies is governed by its own alderman, who is elected and sworn into office at the head-meeting day of his company, held every year at a different time from and unconnected with the Court-leet and Court-baron, where the bailiffs and other officers of the borough are elected and sworn into office. The burgesses or freemen of the borough are elected by the several companies or fraternities from the free brothers of each company in certain proportions, viz.: the

merchants and tailors' company elect, 4; the tanners', 6; the fullers and dyers', 3; the smiths, saddlers, and armourers', 3; the cordwainers', 3; the weavers', 3; and the skimmers and butchers', 2. — In all, 24. The alderman presides at the meeting of his company when such election is made, and certifies the names of the persons so elected by the Company to the steward of the Court at one of the two Courts-leet held for the said borough in every year, — viz., on the first Monday after the clause of Easter and the first Monday after Michaelmas-day; and the persons so certified by the respective aldermen to have been elected are there sworn and admitted burgesses or freemen of the borough. The grant of the 12th March, in the 6th year of the reign of King Edward VI., of certain lands in Northumberland for the maintenance and support

of a master and usher of a free grammar-school at Morpeth, [*250] is to *the bailiffs and burgesses of the borough of Morpeth.

The charter of confirmation of all the ancient usages, customs, and privileges of the borough of Morpeth, dated 30th December, 15th Charles II., is to the bailiffs and burgesses of the said borough. The bailiffs and burgesses, at the time of making of the indenture hereafter mentioned, were seised in fee of the tenements therein mentioned, and such indenture was made as hereafter mentioned (that is to say) —

By indenture, bearing date the 15th of September, 1794, and made between Edward Challoner and Thomas Clemell, bailiffs of the borough and corporation of Morpeth in the county of Northumberland, and John King, Thomas Bowman, William Scott, James Thompson, Ralph Bowman, and Robert White, aldermen of the said borough and corporation of Morpeth, with the assent and consent of all the free burgesses of Morpeth aforesaid of the one part, and William Wood of Buller's Green, in the parish of Morpeth aforesaid, weaver, of the other part, It was witnessed, That the said bailiffs, aldermen, and burgesses, for and in consideration of the yearly rent and covenants therein contained, did demise, &c., unto the said William Wood, his executors, administrators, and assigns, certain premises therein mentioned and described (being the premises in question), with the appurtenances, for the term of 21 years from Martinmas then next ensuing the date thereof, yielding and paying therefore yearly and every year, during the said term of 21 years, unto the said bailiffs, aldermen, and burgesses, and their successors, the yearly rent of £6 10s. of

good and lawful money of Great Britain, payable at Whitsuntide and Martinmas, by even and equal payments. And in case the said yearly rent of £6 10s. should be behind and unpaid for the space of 40 days next after the said days of payment, the same being legally demanded, that then and from thenceforth it should and might be lawful for the said *bailiffs, alder- [*251] men, and burgesses, and their successors, into the said demised premises to enter and distrain, &c., &c. There was a clause of re-entry, and several other covenants, all made with the said bailiffs, aldermen, and burgesses. The indenture then proceeded thus: "And the said bailiffs, aldermen, and burgesses, for themselves and their successors, did thereby covenant and agree to and with the said William Wood, his executors, administrators, and assigns, that in consideration of the performing all and singular the covenants and agreements to be paid, done, kept, and performed on their part, it should be lawful to and for the said William Wood, his executors, administrators, and assigns, to have, hold, occupy, possess, and enjoy all and singular the thereby demised premises, without the lawful let, suit, trouble, or molestation of them, or any of them, or any of their successors, during the term thereby granted." And the said indenture concludes thus: "In witness whereof we have hereunto set our hands and seals, the day and date first above written." The said indenture was signed and sealed by the said bailiffs and five of the said six aldermen, with their Christian and surnames, and their private seals annexed, but the common seal of the borough was not affixed thereto; it was duly executed by the said plaintiff being the said lessee, by his signing, sealing, and delivering the same. The plaintiff, being the said lessee, upon the making and executing of the said indenture, entered into the said demised premises, with the appurtenances, and was possessed of and enjoyed the same until the time of making the above mentioned distress. The sum of three pounds and five shillings, for half a year of the said rent of the said demised premises, with the appurtenances, at Whitsuntide, one thousand eight hundred and three, became due and payable from the plaintiff under and by virtue of the same indenture, and until and at the time of making the said distress, was and still is in arrear and unpaid. *The rent that had [*252] before accrued due was always paid by the plaintiff to the bailiffs of the said borough for the time being. On the third day

of September one thousand eight hundred and three, notice in writing was signed by James Bowman, Thomas Clennell, John Daglish, Robert Creighton, John Singleton, Nicholas Henderson, and Francis Singleton, the then aldermen of the above-mentioned companies or fraternities, at a meeting called by those aldermen as a common guild, but without the concurrence of the bailiffs, and for which reason the bailiffs did not attend it, although they had notice, and was on that day given so signed to the plaintiff to pay the rent due at Whitsuntide then last to them the said aldermen, or to whom they should appoint. Thomas Clennell, who signed the above notice, was the Thomas Clennell mentioned in, and a party to the above indenture of lease. In consequence of this notice the plaintiff refused to pay that rent to the bailiffs of the said borough; and on the twenty-eighth of the same September the distress was made.

The seven aldermen who signed the above notice were the aldermen of the respective fraternities above-mentioned, not only at the time of signing thereof, but also at the time when the last mentioned half-year's rent became due; and at the time of the distress, Benjamin Woodman and Robert Nevins, who then and at those times were the bailiffs of the said borough in the latter end of August, one thousand eight hundred and three, gave a verbal authority to Mr. Henry Brumell, attorney-at-law, to distrain for this rent, who then told them that he had applied to the defendant for that purpose, which they approved of.

The usage with respect to the custody of the common seal of the borough has been and is as follows: The common seal is kept in a chest or hutch belonging to the corporation, called the corporation hutch, which is locked with seven locks, the keys of which are kept by the seven aldermen, each of them keeping the [* 253] key of a different *lock. The bailiffs keep the key of the door of the room in which the hutch is deposited and locked, and the aldermen cannot, without violence, in fact enter the same room without the consent of the bailiffs, nor can the bailiffs in fact get, without violence, at the contents of the corporation hutch. The aldermen attend the Court-leet, not only as suitors to those Courts, which they and all the other burgesses, when resident within the borough, are, but also for the purpose of certifying, and there they do severally certify to the steward of the said Courts the names of the free brothers who have been

recently elected of their respective companies or fraternities for burgesses or freemen. With respect to the bailiffs accounting, when they go out of office, for the receipts and disbursements, it appears from the book of the corporation, by the entries thereof from the year 1576 to the year 1791, both inclusive, that in 98 years, at various periods of that time, they accounted with the succeeding bailiffs, no other person being described as present; and in 75 years, at various periods also of that time, they accounted in some instances with the succeeding bailiffs, in the presence of the aldermen, and in other instances with the succeeding bailiffs and the aldermen and others, and in some instances, from the year 1752 till the year 1791, the accounts were signed as allowed, sometimes by the bailiffs only, and sometimes by the bailiffs and aldermen, who were present; and on such their accounting in the following years, (that is to say) 1598, 1608, 1609, 1613, 1616, 1617, 1618, 1763, 1766, and from thence in every year until and in the year 1774, and also in the year 1777, and from thence in every year until and in the year 1791, the balance is stated in the entries in that book either to be put into the corporation lutch or paid to the succeeding bailiffs, for the town's use. The following entry also appears in that book, with the names of two persons *described bailiffs, and five others described [*254] aldermen (that is to say), "16th March, 1671, Memorandum, that the day and year abovesaid, at a meeting of the bailiffs and aldermen, and the burgesses, in the Tolbooth, it was unanimously agreed upon, that the bailiffs, every year, at St. Andrew's day, after they are out of their office, shall give to the succeeding bailiffs and aldermen and burgesses a true and just account of all monies received in their year. As witness our hands." But this entry is made in a part of the book distinct from the other entries; and the entries for the next ten succeeding years are of accounting before the bailiffs only for the town's account.

The question for the opinion of the Court was, Whether the plaintiff was entitled to a verdict on the above issues? If not, a verdict was to be entered upon all or any of the above issues as the Court should think the said parties, or either of them, entitled.

Best, Serjt., for the plaintiff. The question intended to be raised by this action is, Whether the aldermen of the borough of Morpeth have any right to interfere in the letting of the premises upon which this distress was taken? But as it appears that the

aldermen are parties to the lease under which the plaintiff took the premises, and the rent is therein reserved to them, all argument upon the respective rights of the different members of the corporation seems to be precluded, since, without the concurrence of the aldermen, no distress can be taken. [The Court observed, that the lease not being under seal of the corporation was not valid, and that the corporate name was, "the bailiffs and burgesses of the borough of Morpeth," under whom the defendant made cognizance.] The lease under which the plaintiff took the premises is stated to have been made with the assent and consent [*255] "of the bailiffs and burgesses." Payment of *rent to any person makes him who pays tenant to him who receives, and in this case rent has hitherto been paid to the corporation; nor does that payment cease till some of those persons who joined in the lease under which the plaintiff took, gave him notice not to pay. In order to recover upon these issues the defendant must make out that the plaintiff is tenant to those who directed the distress to be taken. Now supposing the plaintiff not to be tenant under the lease, but only by payment of rent; still the rent, though paid to the bailiffs, has been paid to them as officers of the corporation under which the plaintiff held, and does not warrant the attempt now made, — viz., to construe the payment of rent to the bailiffs in one character, as a payment to them in another character. If B., C., and D. join in leasing, they must also join in taking a distress. Here the plaintiff has been in the occupation of premises belonging to the corporation, and has paid his rent to the proper persons, supposing him tenant to the corporation, and holding immediately under them. If A. hold land of B., C., D., and E., and pay his rent to B. and C., he does not thereby acknowledge himself tenant to B. and C., but to B., C., D., and E. The *reddendum* in the lease is to the "bailiffs, aldermen, and burgesses."

Lens, Serjt., *contra*, was stopped by the Court.

Sir JAMES MANSFIELD, Ch. J. This is a sadly perverted case, and brought here with a view which, as the facts now stand, cannot be attained. It is a contest between two parties in the corporation; but the only question to which we can address our attention is, Whether there be enough stated to enable us to say, that the distress has been properly made? The name of the corporation appears to be "the bailiffs and burgesses of the

borough of Morpeth," and the bailiffs are the persons *whose duty it is to collect and receive the rents of the [*256] corporation. The aldermen, it is true, are parties to the lease, and the *reddendum* is to them, as well as "the bailiffs and burgesses," but it is to them in their corporate, and not in their individual capacity; for it is to them and their "successors," not "their heirs, executors, and administrators." The lease, indeed, throughout every part, appears to have been intended as a corporation lease, though, when the parties execute, by mistake they affix their private seals instead of affixing the corporation seal. Up to this time the rent that has accrued has been paid to the bailiffs of the borough. The usage of the borough with respect to the mode of keeping the corporation seal is stated on the case, and, consistently with that usage, the bailiffs may have a right to lease the lands of the corporation, though to a certain degree under the control of the aldermen. Clearly the introduction of the aldermen into this lease was a blunder. This being the case, I can only consider this to have been intended to be a corporation lease of corporation lands to the plaintiff, and to have been executed in a blundering manner. The plaintiff has entered and paid his rent from time to time to the bailiffs of the borough, who are the proper persons to receive it. The lease then being void in consequence of the blunder in the mode of its execution, is not the plaintiff tenant from year to year? And half a year's rent being now due, have not the corporation a right to distrain for that rent? That appears to me to be the plain result of all the facts stated in the case. Supposing the lease to have been properly executed, the only question would be, whether the introduction of the names of those persons who happened to be aldermen of the borough at the time of the execution would make the lease void? As at present advised, I think all that is introduced about the aldermen might be rejected as surplusage; and if so, the result would be *the same as it will be from our considering the lease [*257] void, and the tenancy as a tenancy from year to year, with half a year's rent due.

ROOKE, J. I am of the same opinion. Supposing the bailiffs and burgesses to have granted a lease, and the aldermen to have refused to allow the corporation seal to be affixed, might they not have been compelled by *mandamus*? The question intended to be brought before us is, whether the aldermen are an integral part of

the corporation or not. That question we cannot decide upon this case. The rent has been received from this plaintiff during the space of eleven years, and now the aldermen want to put their negative on its being received as heretofore.

CHAMBRE, J. This case does not bring before us the question that was intended to be raised, nor do I see how that question could be brought before us in such an action. The only question at present to be decided is, under whom the plaintiff holds as tenant of the premises upon which the distress has been taken? It has been contended, that he holds under the aldermen; but that is contrary to all the facts stated in the case. Hitherto he has paid his rent to the persons whose duty it is to collect the corporation rents. Possibly the aldermen may have the power to control the use of the corporation seal, but when used the lease belongs to the principal officers of the corporation. It is enough, however, to say, we can see a tenancy from year to year under the corporation. It matters not what other persons have signed the lease, if it be signed by the proper officers. I agree with my LORD CHIEF JUSTICE and my Brother ROOKE in thinking, that in this case the material issues, — viz., those on the recognizance, must be entered for the defendant. The other issues will be for the plaintiff.

ENGLISH NOTES.

The principal case was followed by the Court of Exchequer in *Ecclesiastical Commissioners for England v. Merral* (1869), L. R., 4 Ex. 162, 38 L. J. Ex. 93, 20 L. T. 573, 17 W. R. 676, where the agents of a corporation agreed with the defendant for the demise to him of a house for three years, the defendant agreeing to put and maintain the house in tenantable repair, and so to deliver it up at the end of the term. The defendant occupied for the three years and held for two years more paying the reserved rent. On his quitting the premises pursuant to a six months' notice the plaintiffs sued for dilapidations. The objection was taken that the agreement from which the obligation arose was not under the seal of the corporation. The Court held, applying the rule of the principal case, that the defendant was for the last two years tenant from year to year of the Corporation upon the terms of the agreement, and held him liable accordingly. "In *Wood v. Tate*," observes KELLY, C. B., "there was an equitable obligation on the corporation, and that equitable obligation supported the implication of a tenancy from year to year, and gave them a right to distrain for the rent, that is, to pursue a legal and not merely an equitable

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remedy.” BRAMWELL, B., says: “The Court there (in *Wood v. Tate*) decided that there was a good common law tenancy between the corporation as landlord and an individual as tenant, on common law considerations only, though without the seal of the corporation.” CLEASBY, B., after observations showing that the conditions under which the tenant has occupied and paid rent were binding on the corporation so that they could not have turned him out, says: “If then the conditions in the demise under which the tenant is in possession, operate in his favour or against the corporation and bind them, he is clearly tenant from year to year, subject to the terms of the same demise, so far as they are applicable to a yearly tenancy.”

The last mentioned case, as well as the principal case, is distinguished in *Mayor, &c. of Kidderminster v. Hardwicke* (1873), L. R., 9 Ex. 13, 43 L. J. Ex. 9, where there was a sale of market-tolls by an auctioneer authorized by resolution under seal of the corporation. The agreement was not signed by the auctioneer, but by another officer of the corporation, and no possession was had under it.

The Law of Distress Amendment Act, 1888 (51 & 52 Viet. c. 21), by s. 7, enacts that no person shall act as bailiff to levy a distress unless he shall be authorized to act as a bailiff by a certificate in writing under the hand of a County Court judge. It has been held under this section that a managing director of a limited company, who levied a distress upon goods of the company's tenant without having any certificate to act as bailiff under the section, was a trespasser. *Hogarth v. Jennings* (7 May, 1892), 1892, 1 Q. B. 907, 61 L. J. Q. B. 601, 66 L. T. 821, 40 W. R. 517.

No. 8. — GRAY v. STAIT.

(C. A. 1883.)

RULE.

THE statutory power (under 11 Geo. II. c. 19, s. 1) to follow goods fraudulently removed, does not extend the power under 8 Anne, c. 14, ss. 6 & 7, so as to authorize a distraint made after the tenancy has come to an end.

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11 Q. B. D. 668-674 (s. c. 52 L. J. Q. B. 412; 49 L. T. 288; 31 W. R. 662).

Landlord and Tenant. — Distress. — Fraudulent Removal of Goods. — Termination of Tenancy.

A landlord cannot follow and distrain his tenant's goods which have [668] been fraudulently removed to prevent a distress for rent due, if at the time

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of the distress the tenant's interest in the demised premises has come to an end and he is no longer in possession.

The plaintiff was tenant to the defendant of a house. The defendant having terminated the tenancy, the plaintiff removed his goods on the day of its termination, and on the same day gave up possession of the house to the defendant. One quarter's rent was due on the day when the tenancy terminated, and as that remained unpaid, within thirty days of the removal the defendant followed the plaintiff's goods to the place of removal, and there distrained them. An action having been brought for wrongful distress, the jury found that the goods had been fraudulently removed in order to prevent a distress: —

Held, that, notwithstanding the finding of the jury, the plaintiff was entitled to judgment.

This was an action for wrongful distress, and was tried before LOPES, J., in Middlesex, when the following facts were proved: —

The plaintiff was tenant to the defendant, Stait, of a dwelling-house, 2, Stamford Brook Cottages, Hammersmith, and the defendant Hayes was a broker. The plaintiff's tenancy was determined by the defendant, Stait, on the 29th of September, 1881, and on that day the plaintiff gave up possession to that defendant, and removed to Pavilion Road, Turnham Green. At the [* 669] time when *the plaintiff left, the sum of £7 10s., being the quarter's rent due on the 29th of September, was owing to the defendant. On the 18th day of October certain men broke and entered the plaintiff's dwelling-house, Pavilion Road, and distrained and took the goods of the plaintiff as a distress for the arrears of rent, and continued in the plaintiff's dwelling-house for eight days. The men who distrained the plaintiff's goods were employed by the defendant, Hayes, and they acted with the knowledge and authority and by the direction of the defendant Hayes and also of the defendant Stait.

The defence was that the plaintiff had fraudulently and clandestinely carried off from 2, Stamford Brook Cottages, his goods and chattels, and had conveyed them to Pavilion Road in order to prevent the defendant Stait from distraining them. The plaintiff's goods were removed on the 27th, 28th, and 29th of September. Within thirty days after the removal of the plaintiff's goods the servants of the defendant Hayes, acting as agents for the defendant Stait, entered into the plaintiff's dwelling-house in Pavilion Road, and there seized and took his goods and chattels as a distress for the rent.

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The jury found that the plaintiff had removed his goods fraudulently.

LOPES, J., was of opinion that the question of law to be determined was whether a landlord could follow the tenant's goods after the tenancy had expired, and after the tenant had abandoned the demised premises. In the present case the distress was clearly illegal, unless it could be justified under 11 Geo. II. c. 19, s. 1. That statute was substantially a re-enactment of 8 Anne, c. 14, s. 2 (repealed by the Statute Law Revision Act, 1867, 30 & 31 Vict. c. 59), which was intended to apply to only two classes of cases, — namely, (1) existing tenancies, and (2) those cases where tenancies had existed and the former tenants were holding over. If the statute had been intended to have a wider operation there would have been no necessity for ss. 6, 7; and the powers of the landlord were not carried further by 11 Geo. II. c. 19, s. 1. The learned Judge, therefore, ordered judgment to be entered for the plaintiff for 1s.

The defendants appealed.

*J. M. Moorsom, for the defendants. The question is [*670] whether 11 Geo. II. c. 19, s. 1, applies where the tenancy has expired. The power to follow goods clandestinely removed in order to avoid a distress, was originally conferred by¹ 8 Anne,

¹ By 8 Anne, c. 14, s. 2, power was given to a landlord to distrain goods fraudulently removed within the space of five days. This enactment is repealed by the Statute Law Revision Act, 1867 (30 & 31 Vict. c. 59).

By 8 Anne, c. 14, s. 6, "And whereas tenants *pur auter vie*, and lessees for years or at will, frequently hold over the tenements to them demised after the determination of such leases; and whereas after the determination of such or any other leases, no distress can by law be made for any arrears of rent that grew due on such respective leases before the determination thereof; it is hereby enacted by the authority aforesaid that . . . it shall and may be lawful for any person or persons having any rent in arrear or due upon any lease for life or lives, or for years, or at will, ended or determined, to distrain for such arrears, after the determination of the said respective leases, in the same manner as they might have

done if such lease or leases had not been ended or determined."

Sect. 7: "Provided that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due."

By 11 Geo. II. c. 19, s. 1: "In case any tenant or tenants, lessee or lessees, for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away or carry off or from such premises, his, her, or their goods or chattels, to prevent the landlord or lessor, landlords or lessors, from distraining the same for arrears of rent so reserved, due, or made payable; it shall and may be lawful to and for

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c. 14, s. 2, now repealed: the statute now in force is 11 Geo. II. c. 19, s. 1, which is substantially the same, except that the time is extended within which the distress may be made.

[BRETT, M. R. It was held by LORES, J., that although [*671] the *plaintiff's goods were fraudulently removed, and were removed during the tenancy, yet, as the goods were seized after the conclusion of the tenancy, this action for wrongful distress was maintainable. The argument for the defendants really is, that as the landlord might have distrained, after the termination of the tenancy, upon the premises if the tenant had continued in possession, he could lawfully distrain off the premises although the tenant had given up possession.]

The present question has never before arisen, and there is no authority precisely in point. The defendant was, at all events, entitled to distrain the goods removed on the 29th of September, when the quarter's rent became due. *Dibble v. Bowater*, 2 E. & B. 564, 22 L. J. Q. B. 396. It was intended by 11 Geo. II. c. 19, s. 1, that the landlord should have a summary remedy for a fraudulent removal, and should not be driven to a barren right of action. *Opperman v. Smith*, 4 D. & R. 33. In *Nuttall v. Staunton*, 4 B. & C. 51, it was held that a landlord might lawfully distrain where the tenant, by his permission, had remained in possession of part of a farm after the expiration of the tenancy.

Upjohn, for the plaintiff. It was intended by 11 Geo. II. c. 19, s. 1, to confer upon a landlord a power of distraining, of which he had been deprived by his tenant's fraud. In the present case the tenant, the plaintiff, went out on the 29th of September, and the landlord, the defendant Stait, distrained on the 18th of October: the plaintiff committed no fraud; it was not wrongful in him to remove his goods and to go out of the house of the defendant Stait, for it was his duty to give up possession on the 29th of September. Further, the statute gives no power to distrain unless the goods

every landlord or lessor, landlords or lessors, within that part of Great Britain called England, dominion of Wales, or the town of Berwick-upon-Tweed, or any person or persons by him, her, or them for that purpose lawfully empowered, within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels,

wherever the same shall be found, as a distress for the said arrears of rent; and the same to sell, or otherwise to dispose of, in such manner as if the said goods and chattels had actually been distrained by such lessor or landlord, lessors or landlords, in and upon such premises, for such arrears of rent; any law, custom, or usage to the contrary in anywise notwithstanding."

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are removed after the rent is in arrear. *Rand v. Vaughan*, 1 Bing. N. C. 767. It is clear that when a tenant has given up possession, his goods cannot be distrained. *Taylorson v. Peters*, 7 A. & E. 110.

J. M. Moorsom, in reply. The answer to the argument founded upon *Taylorson v. Peters* is, that in that case at the time of the distress another tenant had come into possession.

BRETT, M. R. The defendants cannot get over this difficulty, — * namely, that if there had been no fraudulent [* 672] removal, there could have been no lawful distress either at common law or under the statutes.

In this case the action is brought for a wrongful seizure of goods. The goods were seized by the authority of the defendant Stait, who had been landlord of a house let to the plaintiff. The goods seized had been on the demised premises whilst the tenancy existed; but they were removed on the 27th, 28th, and 29th of September. Rent was due at the time of the removal of those goods, which were removed on the 29th of September. The jury found that the goods had been removed with intent to prevent a seizure, and therefore had been fraudulently removed. Notwithstanding this finding, the Judge entered the judgment for the plaintiff; he was of opinion that the goods had not been lawfully seized under the statutes. I think that no question can arise with regard to those goods, which were removed on the 27th and 28th of September before the quarter's rent was due; clearly they were not seized under the statutory powers. With regard to those goods which were seized on the 29th of September, when the rent was due, the question has been well argued on both sides; but in the result I think that the landlord remains unprotected, and that the decision of LOPES, J., on the point before us was right. The statute relied upon, 11 Geo. II. c. 19, s. 1, has only a limited operation; where there has been a fraudulent removal of the tenant's goods in order to prevent a distress, it confers upon the landlord a power to distrain in those cases in which, if the goods had not been removed, he might have distrained either under the common law or under 8 Anne, c. 14, ss. 6, 7. In this case could the landlord have distrained if the goods had not been fraudulently removed? It seems to me that he could not. The 6th section of 8 Anne, c. 14, gives power to distrain after the determination of the tenancy; but this power is subject to the limitations con-

tained in s. 7; and one of those limitations is that the distress must be levied "during the possession of the tenant from whom such arrears became due." The possession of the tenant may be either at will or by sufferance; and his goods may be distrained so long at least as he is in actual possession. The statute 11 [*673] Geo. II. c. 19, s. 1, does not help a * landlord, who could not have levied a distress if the goods had remained on the demised premises; here the tenant at the time of the distress had no possession of the demised premises, either rightful or wrongful. The judgment of LOPES, J., was right, and the appeal must be dismissed.

COTTON, L. J. I am of the same opinion. The statute 11 Geo. II. c. 19, s. 1, gives a power of distress over goods fraudulently removed off the premises only where they would have been distrainable if they had remained upon the premises. The power to distrain after the expiration of a tenancy is conferred by 8 Anne, c. 14, s. 6; but this power is limited by certain conditions contained in s. 7. In order to justify a distress, it is clear to me that there must be a possession, either wrongful or rightful; in the present case there was no possession of the demised premises by the plaintiff at the time of the seizure. The appeal must be dismissed.

BOWEN, L. J. I am of the same opinion. The defendants' counsel in effect contended that the landlord has a right of distress whenever the tenant's goods have been fraudulently removed, even although he would not have had a right of distress if they had not been fraudulently removed. But I cannot agree to this argument. The statute 11 Geo. II. c. 19, s. 1, allows a distress upon goods fraudulently removed, only where a distress could have been lawfully made if they had remained upon the demised premises. The argument for the defendants is not assisted by the provisions of 8 Anne, c. 14, ss. 6, 7; these enactments merely provide that the goods of the tenant may be distrained after the expiration of the tenancy whilst he remains in possession. In the present case the plaintiff, the tenant, was not in possession, and the goods were not upon the demised premises at the time when they were seized; but the fact that the tenant's goods were upon the demised premises would not conclusively indicate that he was in possession of the premises. Accordingly, in a case of fraudulent removal like the present, it would be necessary to leave to the jury the ques-

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tion, whether if the tenant had not fraudulently removed his goods and gone out, he would have been in *possession [* 674] merely by reason of leaving the goods upon the premises if he had left them there. This is a question which no jury could be expected to answer.

Appeal dismissed.

ENGLISH NOTES.

To bring the removal of the goods within the statute they must not have been removed before the rent became due. *Rand v. Vaughan* (1835), 1 Bing. N. C. 767, 1 Scott 670, 1 Hodges 173. But, where the tenant fraudulently removes the goods on the day the rent becomes due, there is a fraudulent removal within the statute, and on the following day (when the rent is *in arrear*) or within thirty days after, the landlord may follow and seize them. *Dibble v. Bowater* (1853), 2 Ell. & Bl. 564, 22 L. J. Q. B. 396, 17 Jur. 1054.

If the removal is "fraudulent" it is not necessary, to bring the case within the statute, that the removal should be also "clandestine." And although the removal be done openly, it is a question for the jury whether it was done for the purpose of depriving the landlord of his remedy by distress, and, if so, it is fraudulent. *Opperman v. Smith* (1824), 4 Dowl. & Ry. 33; *Parry v. Duncan* (1831), 7 Bing. 243, 5 Moore & Payne 19, M. & M. 533; *Inkop v. Morchurch* (1861), 2 F. & F. 501; *Gillam v. Arkwright* (1850), 16 L. T. (O. S.) 88. And where a creditor of the tenant, apprehending that the goods might be distrained with the assent of the tenant but not (apparently) upon his initiative, carried off stock in satisfaction of a *bonâ fide* debt, this was held not to be a fraudulent removal within the statute. *Bach v. Meats* (1816), 5 M. & S. 200, 17 R. R. 310.

The statute applies to the goods of the tenant only, and not to those of a stranger. *Thornton v. Adams* (1816), 5 M. & S. 38, 17 R. R. 257; *Foulger v. Taylor* (1860), 5 H. & N. 202, 29 L. J. Ex. 154, 8 W. R. 279 (*per* MARTIN, B., 5 H. & N. 210). A similar point is decided upon the statute 19 & 20 Vict., c. 108, s. 75, in *Beard v. Knight* (1858), 8 El. & Bl. 865, 27 L. J. Q. B. 359; *Hughes v. Smallwood* (1890), 25 Q. B. D. 306, 59 L. J. Q. B. 503, 63 L. T. 198. And a person to whom the property passed under a bill of sale given by the tenant is a stranger for the purpose. *Tomlinson v. Consolidated Credit, &c. Co.* (1889), 24 Q. B. D. 135, 38 W. R. 118.

Where a tenant had given due notice to quit a farm, and before the expiration of the notice agreed to occupy and the landlord agreed to let him a part of the farm, the landlord was held not entitled, after

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the expiration of the notice, to distrain (under 8 Anne, c. 14, ss. 6 & 7) upon the premises so continuing in occupation of the tenant, for rent due under the old tenancy. For, the premises being held under a new tenancy, the distress was not made "during the possession of the tenant" within the meaning of s. 7. *Wilkinson v. Peel* (21 January, 1895), 1 Q. B. 516, 64 L. J. Q. B. 178, 72 L. T. 151, 43 W. R. 302.

To justify the breaking open of a lock (under 11 Geo. II., c. 19, s. 7) to distrain cattle which have been fraudulently removed, it must be shown that a constable was present when the lock was broken open. *Rich v. Woolley* (1831), 7 Bing. 651. A special constable duly appointed for the occasion by the warrant of a magistrate is sufficient. *Cartwright v. Smith* (1832), 1 Mood. & Rob. 284.

AMERICAN NOTES.

This case is cited in 2 Taylor on Landlord and Tenant, sect. 576.

In most of the States the landlord is authorized by statute to follow goods removed from the premises. In Pennsylvania the removal must have been after rent fell due. *Grace v. Shively*, 12 Sergeant & Rawle, 217, and the removal must have been fraudulent. *Porfel v. Sands*, 1 Ashmead, 120. The distraint may be made after such removal, even after expiration of the lease. *Dorsey v. Hays*, 7 Harris & Johnson (Maryland), 370. See generally, *Weiss v. Jahn*, 37 New Jersey Law, 93; *Poor v. Peebles*, 1 B. Monroe (Kentucky), 1; *Hale v. Omaha Bank*, 49 New York, 626; *Schenley's Appeal*, 70 Pennsylvania State 98; *Dalton v. Laudahn*, 27 Michigan, 529; *Groton Co. v. Gardner*, 11 Rhode Island, 626. But in New York this applies only to the tenant's goods, and not to those of others on the premises. *Coles v. Marquand*, 2 Hill, 447.

No. 9. — *SIMPSON v. HARTOPP.*

(C. P. 1744.)

No. 10. — *CLARKE v. MILLWALL DOCK COMPANY.*

(C. A. 1886.)

RULE.

THE following things cannot be distrained: —

1. Things annexed to the freehold.
2. Things delivered to a person exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ.
3. Cocks or sheaves of corn.

No. 9. — *Simpson v. Hartopp*, Willes, 512, 513.

And the following cannot be distrained, if there is sufficient distress besides: —

4. Beasts of the plough and instruments of husbandry.

5. The instruments of a man's trade or profession.

But things belonging to a third person, which are on demised premises for the purpose of being wrought up or manufactured by a tenant in the way of his trade, are not privileged from distress, unless they have been delivered by that third person to the tenant for that purpose.

Simpson v. Hartopp.

Willes, 512-517 (s. c. 1 Smith's Leading Cases, 8 ed. p. 450).

Distress. — Things privileged. — Implements of Trade. [512]

Implements of trade are privileged from distress for rent, if they be in actual use at the time, or if there be any other sufficient distress on the premises.

But if they be not in actual use, and if there be no other sufficient distress on the premises, then they may be distrained for rent.

The opinion of the Court was delivered, as follows, by

WILLES, Lord CHIEF JUSTICE. *Trover*. This comes before the Court on a special verdict found at the Leicester assizes, held at Leicester on the 3d of August, 1743.

* The plaintiff declared against the defendant for that [* 513] on the 20th of October, 1741, he was possessed of one frame for the knitting, weaving, and making of stockings, value £20, as of his own proper goods, and being so possessed he lost the same, and that afterwards, to wit, on the 18th of August, 1742, it came to the hands of the defendant, who knowing the same to be the goods of the plaintiff afterwards, to wit, on the 19th day of the same month of August, converted the same to his own use; damages £30.

The defendant pleads not guilty; and the jury find that the plaintiff on the 27th of March, 1741, was possessed of one frame for knitting, weaving, and making stockings, value £8, as his own proper goods. That upon that day he let the said frame to John

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Armstrong at the weekly rent of 9d. and so from week to week as long as they the said Nathaniel Simpson (the plaintiff) and John Armstrong should please; by virtue of which letting the said John Armstrong was possessed of the said frame at the said rent until the time after mentioned, when the same was seized as a distress for rent by the defendant. That the said John Armstrong is by trade a stocking weaver, and used the said stocking-frame as an instrument of his trade, and continued the use thereof, and his apprentice was using the said stocking-frame at the time therein-after mentioned, when the same was seized by the defendant as a distress for rent. That the said John Armstrong held of the defendant a certain messuage and tenement in the parish of Woodhouse and county of Leicester, by virtue of a lease to him the said John Armstrong thereof granted by the defendant, under the yearly rent of £35, for a term of years not yet expired, and was in the actual possession of the same when the said stocking-frame was distrained for rent by the defendant. That on the 19th of December, 1741, John Armstrong was indebted to the defendant in £53 for arrears of rent of the said messuage and tenement; and that the said stocking-frame was then upon the said messuage in the possession of the said John Armstrong, and that there were not goods or chattels by law distrainable for rent in the said messuage without the said stocking-frame sufficient to satisfy the said rent so in arrear at the time when the said stocking-frame was seized as a distress for the said rent. That on the [* 514] said 19th of December the * defendant entered in the said messuage and tenement, and then and there seized the said stocking-frame on the said premises as a distress for the said rent so in arrear, as the said John Armstrong's apprentice was then weaving a stocking on the same frame. And that the defendant (though often requested) hath refused to deliver the said stocking-frame to the said plaintiff, and continues to detain the same. The special verdict concludes, as usual, by submitting the matter to the opinion of the Court whether the said stocking-frame was by law distrainable for the said arrears of rent or not; and if the Court should be of opinion that it was not, they assess the damages of the plaintiff at £8, &c.

Upon this special verdict three questions arise,

First, whether a stocking-frame has any privilege at all, as being an instrument of trade; or whether it be generally distrainable

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for rent as other goods are, even though there was sufficient distress besides.

Secondly, though it may be so far privileged as not to be distrainable if there be no other goods sufficient, yet whether or not it may not be distrained if there be not sufficient distress besides.

Thirdly, though it be distrainable either in the one case or the other when it is not in actual use, yet whether or no it has not a particular privilege by being actually in use at the time of the distress, as the present case is.

I shall but touch upon the two first questions, because they are not the present case; but yet it may be proper to consider them a little to introduce the third, which is the very case now in question.

There are five sorts of things which at common law were not distrainable.

1st. Things annexed to the freehold.

2d. Things delivered to a person exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ.

* 3d. Cocks or sheaves of corn. [* 515]

4th. Beasts of the plough and instruments of husbandry.

5th. The instruments of a man's trade or profession.

The first three sorts were absolutely free from distress, and could not be distrained, even though there were no other goods besides.

The two last are only exempt *sub modo*, that is, upon a supposition that there is sufficient distress besides.

Things annexed to the freehold as furnaces, millstones, chimney-pieces, and the like, cannot be distrained, because they cannot be taken away without doing damage to the freehold, which the law will not allow.

Things sent or delivered to a person exercising a trade to be carried, wrought, or manufactured in the way of his trade, as a horse in a smith's shop, materials sent to a weaver, or cloth to a tailor to be made up, are privileged for the sake of trade and commerce, which could not be carried on if such things under these circumstances could be distrained for rent due from the person in whose custody they are.

Cocks and sheaves of corn were not distrainable before the statute 2 Will. & M. c. 5 (which was made in favour of landlords), because they could not be restored again in the same plight and

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condition that they were before upon a replevin, but must necessarily be damaged by being removed.

Beasts of the plough, &c., were not distrainable in favour of husbandry (which is of so great advantage to the nation), and likewise because a man should not be left quite destitute of getting a living for himself and his family. And the same reasons hold in the case of the instruments of a man's trade or profession.

But these two last are only privileged in case there is distress enough besides; otherwise they may be distrained.

These rules are laid down and fully explained in *Co. Lit.*

47 *a.*, *b.* and many other books which are there cited; [* 516] and *there are many subsequent cases in which the same doctrine is established, and which I do not mention because I do not know any one case to the contrary.

From what I have said on this head, the second question is likewise answered; for as the stocking-frame in the present case could only be privileged as it was an instrument of trade, we think that it might have been distrained if it had not been actually in use, it being found that there was not sufficient distress besides. These are the words in *Carth.*, 358, in the case of *Vinkinstone v. Ebdon*, "the very implements of trade may be distrained if no other distress can be taken."

But whether or no this stocking-frame being actually in use at the time of the distress gives any further privilege is the third and principal question in the present case. And we are all of opinion that upon this account it could not be distrained for rent for these two plain reasons:—

1st. Because it could not be restored again upon a replevin in the same plight and condition as it was, but must be damnified in removing, for the weaving of the stocking would at least be stopped if not quite spoiled, which is the very reason of the case of corn in cocks, &c. :

2dly, Whilst it is in the custody of any person and used by him, it is a breach of the peace to take it. And these are two such plain and strong reasons that even if it were quite a new case I should venture to determine it without any authority at all; but I think that there are several cases and authorities which confirm this opinion.

It is expressly said in *Co. Litt.* 47 *a.*, that a horse whilst a man is riding upon him, or an axe in a man's hand cutting wood, and

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the like, cannot be distrained for rent. In Bracton and several other old books there is a distinction made between *catalla otiosa* and things which are in use. It was held in P. 14 H. VIII. pl. 6, that if a man has two millstones and only one is in use, and the other lies by not used, it may be distrained for rent. In *Read's Case*, Cro. Eliz. 594, it was holden that yarn carrying on a man's shoulders to be weighed * could not be distrained [* 517] any more than a net in a man's hand, or a horse on which a man is riding. So in *The Viscountess of Bindon's Case*, Moor, 214, it is said that if a man be riding on a horse, the horse cannot be distrained, but if he hath another horse on which he rides sometimes, this spare horse may be distrained.

I could cite many other cases to the same purpose, but I think that these are sufficient to support a point which has so strong a foundation in reason, especially since there is but one case which seems to look the contrary way, which is the case of *Webb v. Bell*, 1 Sid. 440, where it was holden that two horses and the harness fastened to a cart laden with corn might be distrained for rent. But in the first place I am not clear that this case is law; and besides it is expressly said in that case that a horse upon which a man was riding cannot be distrained for rent; and therefore a *querre* is made whether if a man had been on the cart the whole had not been privileged, which is sufficient for the present purpose, it being found that the stocking-frame was to be in the actual use of a man at the time when it was distrained.

For these reasons, and upon the strength of these authorities we are all of opinion that this stocking-frame, the apprentice being actually weaving a stocking upon it at the time when it was distrained, was not distrainable for rent, even though there were no other distress on the premises; and therefore judgment must be for the plaintiff.

Clarke v. Millwall Dock Company.

17 Q. B. D. 494-503 (s. c. 55 L. J. Q. B. 378; 54 L. T. 814; 34 W. R. 695).

Landlord and Tenant. — Distress. — Privilege from Distress. — Things [494] *on the demised Premises to be dealt with in the way of Trade.*

Things belonging to a third person, which are on demised premises for the purpose of being wrought up or manufactured by the tenant in the way of his trade, are not privileged from distress by the landlord unless they have been sent or delivered by such third person to the tenant for that purpose.

Appeal from a judgment of POLLOCK, B.

Claim for £1721 as damages for the wrongful detention by the defendants of a ship called the *Swillington*, the property of the plaintiff as executor of W. France, deceased.

The defence in substance was that the defendants lawfully detained the ship upon premises occupied by one Gilbert as tenant to the defendants under a distress for arrears of rent due from him to them; that they detained the ship for a reasonable time until they were paid the sum of £1721, being the amount of arrears of rent, and then delivered it to the plaintiff and Gilbert.

The action was tried by POLLOCK, B., without a jury, at the Middlesex sittings in June, 1885, when the material facts proved in evidence, or admitted, were as follows:—

In 1882, Gilbert contracted to build for France a steamship according to certain specifications and models. The contract was contained in correspondence between the parties, and by the terms of it the price was to be £8000, to be paid by nine equal instalments, each instalment to become due as certain specified parts of the ship were completed.

Gilbert began the work about the end of November, 1882, in a dry dock occupied by him as tenant to the defendants.

France died on the 27th of August, 1883, and the plaintiff was the sole executor of his will.

On the 11th of September, 1883, the defendants seized the ship upon the premises let to Gilbert, under a distress for [*495] arrears of *rent, amounting to £1721, due from Gilbert to them in respect of his tenancy of the dry dock.

The ship was detained by the defendants under the distress until the 2nd of October, 1883, when the plaintiff paid the sum of £1721 to the defendants under protest, in order to obtain the release of the ship, and the defendants thereupon gave up possession of the ship.

At the date of the execution of the warrant of distress, the ship was nearly completed, and France had paid all the instalments due under his contract with Gilbert as each part of the ship was built.

During the progress of the work the materials and things necessary to carry out the building of the ship were supplied to Gilbert by the various makers thereof, and no materials had been sent or delivered by France or the plaintiff to Gilbert to be used for the building of the ship.

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On these facts, POLLOCK, B., gave judgment for the defendants, holding that the ship was not privileged from distress for rent at the time the defendants seized and detained it, and therefore that the detention was lawful.

The plaintiff appealed.

Finlay, Q. C. (McCall, with him), for the plaintiff. It is clear that under the contract between France and Gilbert the property in so much of the ship as was completed passed to France as each instalment was paid. *Ex parte Lambton, In re Lindsay*, L. R., 10 Ch. 405, 44 L. J. Bank. 81; *Clarke v. Spence*, 4 Ad. & E. at p. 466. The ship was thereupon privileged from distress on Gilbert's premises, being within the rule stated in Coke upon Littleton, 47 a. : "Valuable things shall not be distrained for rent for benefit and maintenance of trades, which by consequent are for the commonwealth, and are there by authority of law; as a horse in a smith's shop shall not be distrained for the rent issuing out of the shop, nor the horse, &c., in the hostry; nor the materials in the weaver's shop for making of cloth, nor cloth nor garments in a tailor's shop, nor sacks of corn or meal in a mill, nor in a market, nor anything distrained for *damage feasant*, for it is in custody of the law, and the like." The *rule is also stated [*496] by Blackstone (3 Bl. Com., p. 8) thus: "Valuable things in the way of trade shall not be liable to distress, as a horse standing in a smith's shop to be shoed, or in a common inn; or cloth at a tailor's house, or corn sent to a mill or a market, for all these are protected and privileged for the benefit of trade." The rule has been applied in many cases: *Simpson v. Hartopp*, Willes, 512, 1 Smith's Leading Cases, 8th ed., 450 (No. 9, p. 651, *ante*); *Muspratt v. Gregory*, 1 M. & W. 633, 3 M. & W. 677; *Wood v. Clarke*, 1 C. & J. 484; *Gilman v. Elton*, 3 B. & B. 75 (23 R. R. 567; *Thompson v. Mashiter*, 1 Bing. 283, 8 Moore, 254 (25 R. R. 624). It is true that in *Simpson v. Hartopp*, WILLES, C. J., in stating the second of the five sorts of things which at common law were not distrainable, gives this definition: "Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ." But it is submitted that delivery of the goods is not an essential part of the rule. There is no such qualification of the rule in the statements of it by Coke and Blackstone. The exception in favour of trade from the general law of distress for rent should be extended rather

than limited. It is anomalous and a hardship that one man's goods should be seized on the premises of another to pay that other's debt. The tendency of the decisions should be on public grounds, to extend the exemptions from distress rather than to limit them. *Adams v. Grane*, 1 Cr. & M. 380, 3 Tyrw. 326. When a thing is manufactured for another, and the price has been paid by the person for whom it has been manufactured, the property passes to him; and if he allows it to remain on the premises of the manufacturer for the purpose of having some alteration made in it, it could hardly be contended that the thing manufactured was liable to distress for rent by the landlord of the premises. Yet in such a case there would be no sending or delivery by the person for whom the thing was made. It is contended that the element of delivery is not essential in all cases. It is enough to render goods privileged from distress if they are upon the premises of a person who is not the owner for the purpose of being dealt with in the way of trade.

[*497] [*He also referred to *Miles v. Farber*, L. R., 8 Q. B. 77, 42 L. J. Q. B. 41; *Parsons v. Gingell*, 4 C. B. 545, 16 L. J. C. P. 227; *Woods v. Russell*, 5 B. & A. 942 (24 R. R. 621); *Atkinson v. Bell*, 8 B. & C. 277; *Holdernaess v. Rankin*, 2 De G. F. & J. 258, 29 L. J. Ch. 753.]

Cohen, Q. C., and W. Graham, for the defendants. It is contended that on the true construction of the contract between France and Gilbert the property in this ship had not passed to France or the plaintiff when the defendants' distress was put in. But if it had, the ship was not privileged from distress, because the case has not been brought within any of the established exceptions to the general rule of law that goods on the demised premises are liable to distress for rent whether they are the property of the tenant or not. It is for the plaintiff to show that the materials for making the ship were delivered to Gilbert to be wrought or manufactured in the way of his trade. The exception is in favour of trade and commerce, and it is founded upon the view that public trade would suffer if persons were prevented from sending their goods to be wrought or manufactured on the premises of others by reason of the goods being subject to distress for rent. Here there was no delivery of the goods, nor any equivalent for delivery. The mere fact that goods on the demised premises do not belong to the tenant does not exempt them from distress.

Thus where a carriage is bought in a shop, if the purchaser leaves it there it is subject to distress for the rent of the shop. The rule laid down by WILLES, C. J., in *Simpson v. Hartopp*, Willes, 512, 1 Smith's Leading Cases, 8th ed. 450 (No. 9, p. 651, *ante*), ought not to be extended in the way suggested by the argument for the plaintiff.

[He also cited *Muspratt v. Gregory*, 1 M. & W. 633, 3 M. & W. 677; *Gisbourn v. Hurst*, 1 Salk. 249; *Joule v. Jackson*, 7 M. & W. 450, 10 L. J. Ex. 142.]

Finlay, Q. C., replied.

Lord HERSCHELL, L. C. The sole question in this case is whether an unfinished ship, which was being built for the plaintiff in a dry dock rented by the builder from the defendants, was or was not exempt from distress for rent. The defendants distrained *the ship, and the plaintiff alleges that the [*498] distress was unlawful because the property was in him, and the circumstances were such as to exempt the ship from distress. There is no question that, *primâ facie*, all goods found on the demised premises are subject to distress, but it is said that this case comes within one of the exceptions which have been engrafted on the general law. The facts are that Gilbert, having rented the dry dock from the defendants, entered into a contract with the plaintiff's testator to build for him this ship; the price was to be paid in equal instalments, each instalment becoming due as certain portions of the ship were completed. The instalments due had been paid, and the work was approaching completion. It is not necessary to decide whether, when the instalments were paid, the property in the ship passed to the plaintiff, though the case of *Clarke v. Spence*, 4 A. & E. 448, certainly affords strong ground for saying that it did pass. Assuming that it did, it is, at least, equally clear from the same case that Gilbert was entitled to retain the ship for the purpose of finishing it and earning the remaining instalments. The exception which is said to apply here is that described in the 2nd rule stated by WILLES, C. J., in *Simpson v. Hartopp*, Willes, 512, 1 Smith's Leading Cases, 8th ed., 450 (No. 9, p. 651, *ante*). That rule had been laid down in substantially the same terms in *Gisbourn v. Hurst*, 1 Salk. 249. It was repeated in *Muspratt v. Gregory*, 1 M. & W. 633, 3 M. & W. 677, and has been acted upon in many other cases. Assuming that, as I have said, the property in the ship was in the

plaintiff when the distress was made, the case is one of property belonging to another being on the demised premises, and so far, therefore, within the rule. I agree also that the ship was on Gilbert's premises for the purpose of being "wrought, worked up, or managed in the way of his trade or employ." But it is contended by the defendants that, though on Gilbert's premises for these purposes, there was no thing delivered to him within the meaning of the exception. On the other hand it is said that there need not be a delivery; that it is enough if the goods are on the premises for the purpose of being wrought and worked up; and that when the principle is looked at upon which the exception [*499] is *founded, it does not necessarily involve the idea of delivery. But I am of opinion that we are limited in this case by the strict terms of the exception. It is very difficult to find any sound principle upon which to explain the law of distress and to support the various decisions. No doubt the general law which enables a landlord to distrain the goods of a third person upon the tenant's premises is, as was said in argument, anomalous, and the exception in question is also anomalous. I think that we cannot go beyond the terms of the definition of the exception. There have been many cases in which the courts would be disposed to go beyond those terms, as in *Wood v. Clarke*, 1 C. & J. 484, but in that case it was held that, though materials delivered by a manufacturer to a weaver to be manufactured by him on his own premises were privileged from distress, a frame delivered with the materials to be used in the manufacture was not privileged, unless there was otherwise a sufficient distress upon the premises, because it did not come within the terms of the exception. Looking at the terms of the exception, it is as much a necessary part of it that the goods should be delivered for the purposes of being wrought, worked up, or managed in the way of the trade, as that they should be on the demised premises for those purposes. There is no more reason for rejecting the term "delivered" from the exception than there is for rejecting the terms with respect to the goods being on the demised premises to be wrought, &c., in the way of trade. I am of opinion that the exemption must be limited to cases in which there has been a delivery for the purposes of trade, and that it does not extend to all cases in which goods are on the premises for those purposes. If we might consider the question of principle, delivery of the goods for the pur-

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poses of trade may be essential, because the exception was probably founded on the view that where a person having the right to possession parts with the possession, and entrusts his goods to another for the purposes specified in the exception, and by parting with the possession renders the goods physically subject to seizure upon that other's premises, the goods ought not to be thereby rendered liable at law to distress.

I do not mean to decide that that is the principle, but it may *as well be that as any other principle. It is [*500] sufficient here to say that we cannot reject the word "delivered" in applying the exception. It was said, on behalf of the plaintiff, that the term "delivered" is not found in the exception as stated by Coke (Coke, Litt. 47 *a.*) and Blackstone (3 Bl. Com. 8), and in some of the older authorities. True; but both in Coke and Blackstone the exception is stated in terms so large as to include cases with respect to which a course of decisions has established that the goods are not privileged from distress; and all the illustrations given by Coke and Blackstone of cases within the exception imply the idea of delivery of the goods for the specified purposes. In the present case there was no delivery in any sense of the term. The goods were originally in the possession of Gilbert for the purpose of building the ship; they remained in his possession until the first instalment was paid, and up to that time were liable to distress for rent owing to his landlord. After the first instalment was paid the possession remained in Gilbert, and France and the plaintiff, as his executor, had only the property in them. That being so, can it be said that, giving the widest interpretation to the term "delivered," there was any delivery here within the meaning of the exception? I think the facts dispose of the suggestion that there was any such delivery. As to the illustrations put in argument, when an article is delivered to be repaired or altered the privilege of the exception would clearly apply, and where a carriage is built for a purchaser, and when it has been completed and paid for, the purchaser allows it to remain on the builder's premises for the purpose of having some alteration made, I will not say that those facts might not constitute a delivery within the meaning of the exception, because the purchaser having the right to possession has entrusted the possession to the builder for the purpose of altering the carriage. Here the purchaser of the ship never had the right to possession at any time.

He had the property in the ship, but the possession always remained with Gilbert.

I arrive at my conclusion in this case with some regret, but the exception has been laid down in these terms and acted upon for so many years that it is impossible now to extend it by judicial construction. If extended it must be by the interference [*501] of the *Legislature. For these reasons I am of opinion that the decision of POLLOCK, B., was right, and must be affirmed.

LORD ESHER, M. R. The law with respect to goods privileged from distress is part of the common law. It has been stated over and over again, and is fixed by the judgment of WILLES, C. J., in *Simpson v. Hartopp*, Willes, 512, 1 Smith's Leading Cases, 8th ed., 450 (No. 9, p. 651, *ante*). That learned Judge's statement of the law was made after very careful consideration, and has always been accepted as true and correct. He laid down five exceptions to the general law in the form of rules. Some of those rules apply to goods which are the property of the person upon whose premises a distress is made. The rule in question applies to goods which are the property, not of the person upon whose premises the distress is made, but of another, and it is in these terms: "Things delivered to a person exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ." Afterwards in the same judgment, the CHIEF JUSTICE stated the rule again, and pointed out the reason for it, thus: "Things sent or delivered to a person exercising a trade to be carried, wrought, or manufactured in the way of his trade, as a horse in a smith's shop, materials sent to a weaver, or cloth to be made up, are privileged for the sake of trade or commerce, which could not be carried on if such things, under these circumstances, could be distrained for rent due from the person in whose custody they are." Now all the exceptions are stated in the form of rules, not of principles, and that distinction was upheld by the Court of Exchequer Chamber in *Muspratt v. Gregory*, 1 M. & W. 633, 3 M. & W. 677, where the Court was asked to find that they were principles but refused to do so. The rule in question is stated to be "for the sake of trade and commerce." If that reason, contained in the rule itself, as stated by WILLES, C. J., be the real reason for the rule, I think it is absolutely necessary to say that the words "sent or delivered" form an essential part of it. It is

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the principal essence of the rule, contained in the first part of it, and founded upon the idea that a man would not *send or deliver goods if they were liable to be distrained [*502] upon. They are to be sent by a person whose property they are, and they are to be sent to a person exercising a trade to be wrought, &c., "in the way of his trade or employ." If something is delivered which it is not part of his trade or employment to deal with, the thing delivered is not privileged from distress. The case was put in argument of goods not sent or delivered but manufactured into some article upon the tenant's premises, and it was said that under certain circumstances there might be something equivalent to delivery within the meaning of the rule. I should say that is true, if the article to be manufactured has been completed, and the person who has the property in it leaves it upon the demised premises in order to have some alteration made, because the law would not require him to go through the idle ceremony of taking the article away and returning it. In such a case I think there would be an equivalent to delivery of the thing manufactured. Here nothing was sent or delivered in any sense. I will assume, as the LORD CHANCELLOR has done, that the property in the ship passed to the plaintiff or his testator when the instalments of the price were paid, but it is a necessary implication from the contract that the shipbuilder had the right to possession, and the plaintiff had no such right, until the ship was completed. The plaintiff never had possession of the ship in fact; he never sent or delivered it to Gilbert, and there was nothing in the transaction between them equivalent to sending or delivering. I am therefore of opinion that the rule does not apply to this case, and that the ship was not privileged from distress under the circumstances.

FRY, L. J. I am of the same opinion. The statement of the rule in *Gisbourn v. Hurst*, 1 Salk. 249, was accepted in *Simpson v. Hartopp*, Willes, 512, 1 Smith's Leading Cases, 8th ed., 450 (No. 9, p. 651, *ante*), which has ever since been the leading case on the subject, and all the illustrations of that rule involve the idea of sending or delivery of some article to the person on whose premises the distress is made. I am of opinion that we are not at liberty to depart from that rule, which was also accepted as a *binding exposition of the law in the year 1838, in [*503] *Muspratt v. Gregory*, 1 M. & W. 633, 3 M. & W. 677.

It is to be observed that in all the cases to which the rule has been applied there was, in fact, a sending or delivery. In *Muspratt v. Gregory*, the Court clearly thought that sending or delivery was an important part of the rule; and it is impossible not to see that sending or delivery is important in considering the question of principle. The rule would be greatly enlarged if the words "sent or delivered" were struck out, because, as it stands, the rule only applies where the right to possession in the goods has been in the person for whom they are being wrought or manufactured. I assume that the property was in the plaintiff in this case, but in order to make the rule apply, I think both the property and the right to possession should be in a person who delivers the goods for the purpose of having them wrought, &c., in the way of trade. There is no pretence for saying that the plaintiff was entitled to possession of the ship in question here. There may, perhaps, be cases in which a constructive delivery would be sufficient, but here there was no equivalent for actual delivery. I am of opinion that the defendants are entitled to our judgment.

Appeal dismissed.

ENGLISH NOTES.

The order of the categories of things exempted from distress at common law as mentioned in the judgment in the former principal case (see p. 653, *supra*) will be followed in this note.

1. As to things annexed to the freehold.

The case of *Hellawell v. Eastwood* (1851), 6 Exch. 295, 20 L. J. Ex. 154, is one which has given rise to much discussion. It was there decided that "mules" used for spinning cotton, fixed by means of screws, some into the wooden floors of a cotton-mill, and some by being sunk into the stone flooring, and secured by molten lead, are distrainable for rent. Baron PARKE (at 6 Exch. pp. 311-313) lays down the law as follows: "At common law, things fixed to the freehold, and which become part of it, could not be distrained for two reasons. Lord Chief Baron GILBERT says that 'Whatever is part of the freehold cannot be distrained, for what is part of the freehold cannot be severed from it without detriment to the thing itself in the removal; consequently, that cannot be a pledge which cannot be restored *in statu quo* to the owner. Besides, what is fixed to the freehold is part of the thing demised; and the nature of the distress is not to resume part of the thing itself for the rent, but only the *inducta et illata* upon the soil or house.' See Gilbert on Distresses, pp. 34 and 48. And on the

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sole ground that they were parcel of the freehold, by *construction of law*, keys, windows, and shutters, concerning the realty, are not liable to be distrained.

“It was, besides, a rule at the common law, that things which could not be restored in the same plight and condition could not be distrained for rent. Co. Litt. 47; Gilbert on Distresses, in the part already cited. We have, therefore, to decide whether these machines fall within either of these categories, for otherwise they are not protected. They do not fall within the latter; for, upon being taken to the pound, they might be brought back without damage to themselves. They are not of a perishable nature, and would not suffer by a careful removal. If it were necessary to take some to pieces, in order to remove them, that circumstance would make no difference; for that might occur with chattels with respect to which there is no question, as for instance, post beds; they could not be carried to the pound without being first taken to pieces; and the distrainee would have no reason to complain that they were restored to him in the disjointed state at the pound, where he must attend to receive them. It would save him the trouble of taking the bedsteads to pieces again, in order to replace them, if they had been restored entire. Nor does it make any difference that the distrainee would be obliged to incur the expense of re-fixing the machinery. Precisely the same objection might be made to the distress of any article which it required expense to carry back from the pound, and to restore to its former position. The distrainee at common law must be at the trouble and expense of taking back his goods from the pound. This practical inconvenience is now obviated by the power of impounding on the premises.

“The only question therefore is, whether the machines when fixed were parcel of the freehold; and this is a question of fact, depending on the circumstances of each case, and principally on two considerations; first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed *integre, salve, et commode*, or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the Civil Law, *perpetui usus causâ*, or in that of the “Year Book,” *pour un profit del inheritance* (“Year Book” 20 Hen. VII. c. 13), or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel.

“Now, in considering this case, we cannot doubt that the machines never became a part of the freehold. They were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or to themselves; and the object and purpose of the annexa-

tion was, not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels. They were never a part of the freehold any more than a carpet would be which is attached to the floor by nails, for the purpose of keeping it stretched out, or curtains, looking-glasses, pictures and other matters of an ornamental nature which have been slightly attached to the walls of the dwelling as furniture, and which is probably the reason why they and similar articles have been held in different cases to be removable. The machines would have passed to the executor. (*Per* Lord LYNCHURST, C. B., *Trappes v. Harter*, 2 C. & M. 177.) They would not have passed by a conveyance or demise of the mill. They never ceased to have the character of moveable chattels, and were therefore liable to the defendant's distress."

It cannot be said that *Hellawell v. Eastwood* has been overruled: and as landlords of this species of property may be supposed to have relied upon the decision since 1851, it may be assumed to be law, as between landlord and tenant, in regard to things affixed in the manner and for similar purposes to the ordinary case of mules in a cotton mill. The decision has been recognised and applied in *Reg. v. Lee* (1866), L. R., 1 Q. B. 241 (a rating case), and in *Waterfall v. Penistone* (1856), 6 El. & Bl. 876, 26 L. J. Q. B. 100, 3 Jur. (N. S.) 15 (a question under the Bills of Sale Act 1854).

But in cases between a mortgagee of the freehold, and a mortgagor (or his assigns) claiming things affixed by him to the freehold in this way, as chattels, the reasoning of Mr. Baron PARKE has been denied, and it is now clear law that in such a question things affixed in this way are treated as part of the land. See *Wiltshire v. Cottrell* (1853), 1 El. & Bl. 674, 22 L. J. Q. B. 177, 17 Jur. 758; *Mather v. Fraser* (1856), 2 K. & J. 536, 25 L. J. Ch. 361, 2 Jur. (N. S.) 900; *Walmsley v. Milne* (1860), 29 L. J. C. P. 97; *Clunie v. Wood* (Ex. Ch. 1869), L. R., 4 Ex. 328, 38 L. J. Ex. 223, 20 L. T. 1012; *Loughbottom v. Berry* (1869), L. R., 5 Q. B. 123, 39 L. J. Q. B. 37, 22 L. T. 385; *Holland v. Hodyson* (Ex. Ch. 1872), L. R., 7 C. P. 328, 41 L. J. C. P. 116, 26 L. T. 709, 20 W. R. 990; *Sheffield and South Yorkshire &c. Society v. Harrison* (C. A. 1881), 15 Q. B. D. 358, 54 L. J. Q. B. 15, 51 L. T. 619, 33 W. R. 144; *Southport, &c. Banking Co. v. Thompson* (C. A. 1887), 37 Ch. D. 64, 57 L. J. Ch. 114, 58 L. T. 143, 36 W. R. 113; *In re Yates, Batchelder v. Yates* (C. A. 1888), 38 Ch. D. 112, 57 L. J. Ch. 697, 59 L. T. 47, 36 W. R. 563.

The case of *Hellawell v. Eastwood* was distinguished in *Turner v. Cameron* (1870), L. R., 5 Q. B. 306, 39 L. J. Q. B. 125, 22 L. T. 525, 18 W. R. 514, where the question arose between the assignee of the lessee of a mine and the lessor who, under colour of a power to distrain

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for royalties reserved by the lease, took up and removed certain railways which the tenant had laid down upon the mining property. The mode of construction as well as of the removal of the railways was stated to be as follows: “(1). The ground was brought to a dry and uniform surface by spreading thereon such hard and dry materials as the soil afforded; some further material of the same nature, such as broken stone and cinders, being brought from elsewhere, wherever the natural soil was moist or its surface depressed, so as to require such aid to make it dry and level.

“(2). On the surface thus levelled the sleepers were laid for the most part transversely at equal distances.

“(3). The rails were then laid along the sleepers, and fastened to the surface of them by dog-nails, which are long and strong nails, either driven through holes in the rails prepared for that purpose, or made with a flat head projecting over the foot of the rail, and grasping it closely when hammered down, the sharp end of the nail being in either case driven into the sleeper as deeply as the wood will admit, and thus firmly fixing the nail thereto.

“(4). After these steps had been taken, large quantities of the above-mentioned dry and hard material, called “ballast,” were brought along the line and packed under and about the sleepers, with the twofold object: first, of keeping them dry, and thus preserving them from decay; and secondly, of keeping them, by its support beneath and at the sides, in the position in which they had been placed.

“(5). The rails were clear of the ballast.

“(6). After the railways had been used for traffic, the ballast packed under and about the sleepers became more solid than when first deposited; the sleepers also became more deeply imbedded in the ballast.

“(7). The rails and sleepers were thus removed: The dog-nails were commonly wrenched out of the sleepers with a bar or pick, but in many cases the flattened head of the nails before mentioned was merely knocked aside, when it did not pass through a hole in the rail, the rail being thereby released. Many of the nails were left sticking in the sleepers when the latter were removed. It was impossible to ascertain the relative numbers of the rails detached from the sleepers in these different modes.

“(8). The rails, being thus set free, were carried off.”

As to the removal of the sleepers it was stated that this was done by the removal of the ballast by means of picks with the exception of a certain portion where the ballast had been washed away and the sleepers had been kept in their places by means of stays which could be removed with very little displacement of the soil. It was held that the railways by their mode of annexation to the soil, became fixtures, and were not distrainable.

The judgment of the Court (COCKBURN, C. J., MELLOR, J., LUSH, J., and HANNAN, J.), was delivered by MELLOR, J. After adverting to the distinction made by PARKE, B., in *Hellawell v. Eastwood* as to the mode and purpose of the annexation, the judgment continued: "We think that it must be taken as a fact that the railways in question were constructed for the better enjoyment of the colliery, and were so far permanent that they were intended to remain on the premises as ancillary to the working of the mines, at least, until the expiration of the term; and were so constructed and fixed, not for the purpose of steadying them for *their better use as chattels*, but as a substitute for the natural surface of the ground, along which it would have been impracticable to have worked the trains. It is expressly found by the arbitrator, that they were so fixed and attached to the freehold as not to be capable of being removed without considerable violence and wrenching by means of picks and iron bars, so that, in their removal, considerable holes were left in the surface by the falling in of the ballast material. The rails were wrenched from the sleepers by the use of similar instruments, leaving large nails sticking in the sleepers, and in 'the new railway' the ballast was so placed and packed as to form a roadway for the horses, drawing the trucks over the railway. Now this is a great deal more than 'attaching' the railways" slightly, so as to be capable of removal without the least injury to the surface, or to themselves.' *Per* PARKE, B., in *Hellawell v. Eastwood*, 6 Ex. at p. 312, 20 L. J. Ex. at p. 160. The argument in favour of the defendant mainly rested upon the decision of the Court of Exchequer in *Hellawell v. Eastwood*, 6 Ex. 295; 20 L. J. Ex. 154, and upon the judgment of the Lords Justices in *The Duke of Beaufort v. Bates*, 3 D. G. F. & J. 381, 31 L. J. Ch. 481. The case of *Hellawell v. Eastwood*, has been frequently cited in support of propositions to which it was not applicable, but it has been recognised in this Court in *Waterall v. Penistone*, 6 El. & Bl. 876, 26 L. J. Q. B. 100, and was referred to and distinguished in the judgment of this Court in *Longbottom v. Berry*, L. R., 5 Q. B. at p. 137, 39 L. J. Q. B. 37, and contains, as it appears to us, a true exposition of the law as applicable to the particular facts upon which it proceeded. In that case, the things distrained were mules, used for spinning cotton, fixed to the floor of a mill by screws, or let into stone, and secured by molten lead; and PARKE, B., in delivering the judgment of the Court, said, 'They were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or to themselves, and the object and purpose of the annexation was, not to improve the inheritance, but merely to render the *machines* steadier and more capable of *convenient use as chattels*.' Can this be said to describe the condition of the railways in the pres-

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ent case? On the contrary, the 'mules' were more like the trams and trucks used on the railways in the present case, than the railways themselves, which appear to us to have been more analogous to the floors of the mill."

2. As to things delivered to a person exercising a public trade, &c. (p. 653, *supra*).

The following things have been held to be privileged within this principle: — Goods in the hands of a public carrier for carriage, *Gisborn v. Hurst* (1709), Salk. 249. Goods sent to a commission-agent for sale: *Gilman v. Elton* (1821), 2 Brod. & Bing. 75, 23 R. R. 567; *Findon v. McLaren* (1845), 6 Q. B. 891, 14 L. J. Q. B. 183, 9 Jur. 369. Goods on premises of wharfinger, with whom they have been deposited by a factor for sale, pending opportunity for effecting sale, *Thompson v. Mashiter*, (1823), 1 Bing. 283, 25 R. R. 624. Goods sent to an auctioneer and being on his premises for the purpose of sale, *Adams v. Grane* (1833), 3 Tyrwhitt, 326; 1 C. & M. 380; *Browne v. Arundell* (1850), 10 C. B. 54, 20 L. J. C. P. 30; *Williams v. Holmes* (1853), 8 Ex. 861, 22 L. J. Ex. 283. Carcass of beast sent to butcher to be slaughtered, *Browne v. Shevill* (1834), 2 Ad. & El. 138, 4 N. & M. 277. Silk delivered to a manufacturer to be made into velvet, *Gibson v. Ireson* (1842), 3 Q. B. 39. Goods pledged with a pawnbroker in the way of his trade, *Swire v. Leach* (1865), 18 C. B. (N. S.) 479, 34 L. J. C. P. 150, 11 L. T. 680, 13 W. R. 385, 11 Jur. (N. S.) 179. Furniture sent to a depository, *Miles v. Furber* (1873), L. R., 8 Q. B. 77, 42 L. J. Q. B. 41, 27 L. T. 756, 21 W. R. 262.

The following on the the other hand have been held not to be within the principle of the exemption: — Stocking-frames sent by employer to workman to work up yarns into stockings, *Simpson v. Hartopp*, No. 9, p. 651, *supra*; *Wood v. Clarke* (1831), 1 Tyrwhitt, 314. A boat sent for loading salt in a public place where a trade in salt is carried on, *Muspratt v. Gregory* (1836), 1 M. & W. 633. Brewers' casks left by them on premises of public house to contain the liquor while it is being drawn off and sold, *Joule v. Jackson* (1841), 7 M. & W. 450. The articles in question in these three cases may perhaps be classed in the fifth category as implements of trade. But if they come within this class they are at common law only protected if they are in actual use and no other distress can be found on the premises. This is clearly pointed out in *Fenton v. Logan* (1833), 3 M. & Scott. 82, 9 Bing. 676 (the case of a threshing machine), where *Wood v. Clarke* (1 Cr. & J. 484, 1 Tyr. 315, 1 Price P. C. 26), is referred to. By the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21, s. 7, referring to 9 & 10 Vict. c. 95, s. 96), there is an absolute exemption from distress of (*inter alia*) the tools and implements of the tenant's trade to the value

of £5. But this does not seem to affect the law relating to the tools and implements, being the property of another, of the tenant's trade.

In *Lyons v. Elliott* (1876), 1 Q. B. D. 210, 45 L. J. Q. B. 159, 33 L. T. 806, 24 W. R. 296, it was held that the exemption did not extend to goods sent for sale by auction upon premises not belonging to the auctioneer. BLACKBURN, J., there explains the rule as follows: "No doubt the general rule at common law was that whatever was found on the demised premises, whether belonging to a stranger or not, might be seized by the landlord and held as a distress till the rent was paid or the service performed. This state of the law produced no harm, because at common law the landlord not being able to sell the distress, he generally gave up the goods as soon as he found they were not the tenant's as his continuing to hold them would not induce the tenant to pay. But in the reign of William and Mary a very harsh and unjust law (2 Wm. & M. s. 1, c. 5) was passed, by which the right was given to the landlord to sell any goods seized, and to apply the proceeds to the payment of the rent unless the tenant or owner of the goods first paid it: and this held out a great temptation to a landlord to seize the goods of a stranger although he knew that they were not the tenant's. That is why I doubt whether the reason sometimes assigned for the privilege of goods intrusted to persons exercising certain trades, that they presumably do not belong to the tenant, is the real one. The ground of the privilege is public policy for the benefit of trade; and the privilege is given to the person carrying on that trade, that is, where goods are intrusted to a person in order that he may exercise his trade upon them, they should be privileged from distress at the suit of the landlord of the premises where the trade is exercised. The case of goods in the hands of a carrier, or of goods going to market, is exceptional; the carrier or person taking the goods to market must rest somewhere; in such cases the goods are privileged, though in a private house, not the person's own; and it is very similar to the privilege attaching to goods of a traveller at an inn. The principle is that when a person occupies certain premises and carries on a public trade there, goods which are brought to these premises for the purposes of that trade are privileged. But when the person exercises the trade not on his own premises, are the goods on these premises privileged? I think not."

3. As to cocks and sheaves of corn. The primary authority for this exemption (at common law) is *Wilson v. Duckett* (1665), 2 Mod. 61. The reason given is as follows: "Nothing is to be distrained but what may be known and returned in the same condition as when taken; and therefore a replevin will not lie of money out of a bag or chest; and in this case the corn cannot be returned in the same condition, be-

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cause a great deal may be lost in the carrying of it home." But by 2 W. & M. c. 5, s. 3, after reciting that "no sheaves or cocks of corn loose or in the straw, or hay in any barn or granary, or on any hovel, stack or rick, can by the law be distrained or otherwise secured for rent," — it is enacted that it shall be lawful for any person having rent arrear and due upon any demise, &c., to seize and secure any sheaves, &c., upon any part of the ground charged with the rent, and to lock up or detain the same in the place where the same shall be found, until the same shall be replevied, and in default of replevying, within the time aforesaid (five days), to sell the same after appraisement; but so that the corn, &c., so distrained shall not be removed by the person distraining to the damage of the owner, out of the place where the same shall be found or seized, but be kept there (as impounded) until replevied or sold. It has been decided that as by the express words of the 2nd section of this statute the landlord is required to sell "for the best price that can be gotten" for the goods, he is precluded from imposing a condition that hay, &c., shall be consumed on the premises, although under 56 Geo. III. c. 50, s. 11, any purchaser from the tenant would have been necessarily bound by such a condition. *Hawkins v. Walrond* (1876), 1 C. P. D. 280, 45 L. J. C. P. 772, 35 L. T. 210, 24 W. R. 824. By 11 Geo. II. c. 19, s. 8, power was given to a landlord having rent in arrear to distrain growing corn, grass, or other product, and to cut, gather, carry, and lay up when ripe in the barn or other proper place on the premises, and in convenient time to appraise and sell the same in the same manner as other goods may be distrained and disposed of. The benefit of the statute 2 W. & M. (since 4 Geo. II. c. 28, s. 5) extends to the grantee of a rent charge (*Johnson v. Faulkner*, 1842, 2 Q. B. 925), although the 11 Geo. II. c. 19, s. 8, does not; *Miller v. Green* (Ex. Ch. 1831), 8 Bing. 92.

4. As to the qualified exception of beasts of the plough and instruments of husbandry. This exception is laid down by an old statute (51 Hen. III. stat. 4) which is said to be in affirmance of the common law. *Per* WATSON, B., in *Keen v. Priest* (1859), 4 H. & N. 236, 238. The statute enacts "Que nul home — soit distreine per ses beasts queux gain-out son terre . . . per les bailiffes le roy, ne per autres, tanque come il trove auters chateux sufficient dont ils poient lever le det." In Com. Dig. Distress (c) it is said (referring to the above statute): "Beasts of the plough, or which improve the land, as sheep, &c., shall not be distrained if there be other sufficient distress; which was an affirmance of the common law." In *Keen v. Priest*, *supra*, it was admitted that sheep belonging to the tenant could not be distrained, and the Court held that the exemption applied to sheep placed on the land by a third person who had purchased the grass from the tenant. WATSON, B. said:

“From the earliest period of our history, it has been the law that sheep are not distrainable, if there are other goods on the premises sufficient to satisfy the debt.” In the same case the Court held that colts, steers, and heifers (not being broken or used for the plough) were not “animals that gained the land,” and were not within the exemption.

5. As to the instruments of a man's trade or profession. The exemption is recognised in *Gorton v. Falkner* (1792), 4 T. R. 565, 2 R. R. 463, and in *Fenton v. Logan* (1833), 9 Bing. 676, 3 M. & Scott, 82. And in *Nargett v. Nias* (1859), 1 El. & El. 439, 28 L. J. Q. B. 143, 5 Jur. (N. S.) 198, it was decided by a considered judgment of the Queen's Bench that an action of trespass lies, as well as an action on the case, for distraining tools of a labourer, though not actually in use, while there were other goods not tools of trade, on the premises, sufficient to have satisfied the distress.

While in actual use, tools of trade, as well as other things in actual use, are privileged for another reason, — as it is put in the principal case, — “Whilst it is in the custody of any person and used by him, it is a breach of the peace to take it.” And this appears to be an absolute privilege while the actual use continues. In *Field v. Adams* (1840), 12 Ad. & E. 649, to a plea in trespass justifying the distraining of a horse, cart, and other chattels *damage feasant*, a replication — “that the horse, &c., were at the time of the distress in the actual possession and under the personal care of, and then being used by, the plaintiff,” — was held good. It may be here noted that the head-note in the report of *Fenton v. Logan*, *supra*, — “An implement of trade is only privileged from distress if it be in use *and* if there be no other distress on the premises” — is not borne out by the decision, although extracted from an expression in the judgment of TINDAL, C.J., as there reported. The expression obviously arises from some confusion of thought either in the Judge or in the reporter. In the case of *Wood v. Clarke* (1831), 1 Cr. & J. 484, cited in the judgment, there was no allegation that the thing (a stocking-frame) was in actual use at the time of the distress, although it was stated that it was delivered to the workman for the purpose of his trade. The judgment of PARK, J., apparently states the correct *ratio decidendi*. He says: “*Gorton v. Falkner* (*supra*) is a decisive authority against the plaintiff, for it shows that implements of trade can only be distrained if not in use, *and* there be no other distress.”

A qualified exception to distress is made by the 45th section of the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), which enacts that “where live stock belonging to another person has been taken in by the tenant of a holding to which this Act applies, to be fed at a fair price agreed to be paid for such feeding by the owner of such stock to the tenant, such stock shall not be distrained by the landlord

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for rent where there is other sufficient distress to be found." &c. In *Masters v. Green* (1888), 20 Q. B. D. 807, 59 L. T. 476, 36 W. R. 591, the question was whether this section applied to cattle on a holding pursuant to an agreement by which the tenant in consideration of £2, allowed the owner "the exclusive right to feed the grass on the land for four weeks." It was held that these cattle were not within the section. For they were not "taken in" by the tenant to be fed. &c. (See also notes on Nos. 1 & 2 of "Agistment," 2 R. C. 550.)

By the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21, s. 4), and the County Courts Act, 1888 (51 & 52 Vict. c. 43, s. 147), there is an absolute exemption from distress of the wearing apparel and bedding of the tenant or his family, and the tools and implements of his trade to the value of £5. But this does not extend to any case where the lease, term, or interest of the tenant has expired, and where possession of the premises in respect of which the rent is claimed has been demanded and where the distress is made not earlier than seven days after such demand.

By the Lodgers' Goods Protection Act (34 & 35 Vict. c. 79) the goods of lodgers are, under certain conditions, protected from distress by a superior landlord. "Lodger" has been defined as a lodger in the popular sense, and the test appears to be that the immediate landlord retains some sort of control, as master of the house, although it is not necessary that he reside on the premises. *Phillips v. Henson* (1877), 3 C. P. D. 26, 47 L. J. C. P. 273, 37 L. T. 432, 26 W. R. 214; *Morton v. Palmer* (C. A. 1881), 51 L. J. Q. B. 7, 45 L. T. 426, 30 W. R. 115; *Ness v. Stephenson* (1882), 9 Q. B. D. 245. But in *Hewwood v. Bone* (1884), 13 Q. B. D. 179, 51 L. T. 125, 32 W. R. 752, a person who occupied rooms where he carried on the business of a publisher, but slept and resided elsewhere, was held not to be a lodger within the meaning of the Act, although he had no key of the outer door, but was admitted by his landlord every morning. STEPHEN, J., in giving judgment, says: "We have to say what, upon the whole, we think the statute means by the term 'lodger.' I have come to the conclusion that it meant 'lodger' in the popular sense of the word, — that is, one who sleeps upon the premises. In the ordinary use of language, a person of average education would not call the appellant a lodger, because lodging, in the common acceptation, means living and residing at a place; and if you went further, and asked what was meant by living and residence, in general, the answer would be that the person fulfilled the description if he slept there, — that is, if he undressed and went to bed, staying there till he rose the next morning in the usual way. If it is asked why the Act should have meant this rather than anything else, the answer is that the object was to prevent poor persons from

having their homes broken up by distress for rent by the superior landlord.”

There are various other statutory exemptions: — Rolling stock in a “work” such as a colliery, &c. (35 & 36 Vict. c. 50). See *Easton Estate & Mining Co. v. Western Waggon, &c. Co.* (1886), 54 L. T. 735. Gas-fittings supplied by gas-undertakers under the Gas Works Clauses Act, 1847. This includes gas-stoves. *Gas Light, &c. Co. v. Hurdy* (1886), 17 Q. B. D. 619, 56 L. J. Q. B. 168, 55 L. T. 585, 35 W. R. 50. The same privilege is extended by the Electric Lighting Act, 1882 (46 & 47 Vict. c. 56, s. 25) to a variety of objects supplied by electric light undertakers.

It is to be observed that there are a variety of new statutory conditions imposed upon the powers of distress in agricultural holdings by the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61).

AMERICAN NOTES.

The doctrine of the Rule is substantially stated in our elementary works.

Simpson v. Hartopp is cited in 2 Wood on Landlord and Tenant, sect. 510, and in 2 Taylor on Landlord and Tenant, sects. 587, 596.

Mr. Wood lays it down that at common law nothing can be taken on distress unless it can be returned in the same good plight in which it was taken, the law regarding it as a mere pledge. This exempts fixtures, and perishable property, such as milk and the flesh of animals freshly slaughtered. But with these exceptions, all movable property upon the premises, whether belonging to the tenant or a stranger may be taken, the landlord having a lien in respect to the place where it is found rather than the person of the owner. *Hinely v. Wyatt*, 1 Bay (So. Car.), 102; *Blanche v. Bradford*, 38 Penn. St. 311; 80 Am. Dec. 489; *Matthews v. Stone*, 1 Hill (New York), 565; *Keller v. Weber*, 27 Maryland, 660; *Davis v. Payne's Adm'r*, 1 Randolph (Virginia), 332. As in the days of slavery, on a negro slave of a stranger accidentally on the premises. *Bull v. Horlbeck*, 1 Bay (So. Car.), 301.

But fixtures permanently separated from the freehold by the tenant are distrainable. *Reynolds v. Shuler*, 5 Cowen (New York), 323.

Goods of the tenant's wife are distrainable although her separate property. *Blanche v. Bradford*, 38 Pennsylvania State, 311; 80 Am. Dec. 489. So of a hired piano-forte. *Triebler v. Knabe*, 12 Maryland, 491; 71 Am. Dec. 607, citing *Simpson v. Hartopp*. The Court said: “From the rendition of the judgment in *Simpson v. Hartopp*, *supra*, to the present time, the correctness of the opinion of the Court therein has never been questioned, so far as we know, either in England or this country. The most that has been contended for is, that within the reason and principles of that decision, the Courts are authorized, with a view to the public good and convenience, to embrace within the exceptions to the general rule a large class of cases in which there would be great hardship and serious interruption to the safe dealings of the community, if they were not so included. We are free to confess this view has been enforced with a good deal of sound reasoning and good sense. It rests

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mainly on the *quasi* feudal origin of the right of distress, the change of the business and intercourse of the world since distress became a part of the law of landlord and tenant, and the facilities which an enlightened policy should afford to the meritorious pursuits of life. This aspect of the question the curious will find very forcibly put by Baron PARKE, in *Muspratt v. Gregory*, 1 Me. & W. 650; by Justice BAY, in *Youngblood v. Lowry*, 2 McCord (S. Car.), 39 (13 Am. Dec. 698); and by Chief Justice GIBSON, in the case of *Riddle v. Welden*, 5 Whart. (Penn.) 1. We refer to these opinions as embracing all which perhaps could be urged in furtherance of the widening of the circle of exemption. But as we have already in effect said, we cannot judicially, in the present state of the law of Maryland, give our assent to them.

“If the present case can be brought under any of the heads or classes of exempted articles specified by Lord Chief Justice WILLES, it must be under the fifth, which is, ‘the instruments of a man’s trade or profession.’ Now we have seen this freedom from distress is not absolute, but dependent on circumstances which are not in this case; the article was not in use as an instrument of trade or profession, nor was there a sufficiency of other goods on the premises to meet in full the distress. In the case before us there is an absence of both of these ingredients. It is not shown by the agreed statement of facts that this piano, at the time of the distress, was in use as an instrument of profession, nor are we permitted by the terms of the submission to infer such use from the profession of music, — teacher of the hirer; and besides, it is expressly stated there was an insufficiency of other property on the demised premises to satisfy the rent due the landlord. This being so, the plaintiffs cannot bring themselves within any of the above enumerated exceptions. Nor do we think they can successfully avail themselves of the doctrine which protects the baggage of a transient boarder and lodger at a public inn. The only case which we have been able to find in any way countenancing such a pretension is the one to which we have referred: *Riddle v. Welden*, 5 Whart. (Penn.) 1. That undoubtedly goes the whole length of declaring the goods of a boarder are not responsible for rent due by the keeper of a boarding-house. To the eminent jurist who gave that opinion, we are second to none in yielding the homage of profound respect; but notwithstanding this, we are unable to find him supported either in England or in this country, and as a consequence, we must adhere to what we consider the long and well-established doctrine — a doctrine which, it is apparent from the legislation of many of the States of the Union, and also of our State (act of 1845, c. 130), the community recognized and acted upon. If anything were wanted to fortify the very able opinion in *Simpson v. Hartopp*, Willes, 512, it may be found in Lord DENMAN’s opinion, in his review of the case of *Muspratt v. Gregory*, 3 Mees. & W. 677, subsequently concurred in by Baron PARKE, in *Joule v. Jackson*, 7 Id. 454; and that of Chief Justice TINDAL, in *Fenton v. Logan*, 9 Bing. 676, 23 Eng. Com. L. 416.”

But the right to take a stranger’s goods is limited to those in use by the tenant by the owner’s consent, and does not embrace such as are in the tenant’s possession in circumstances that put the landlord on inquiry as to the title. So property of a boarder, unless in use by the tenant, cannot be

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taken. *Riddle v. Welden*, 5 Wharton (Penn.), 1; *Matthews v. Stone*, 1 Hill (New York), 565; *Jones v. Goldbeck*, 14 Philadelphia, 173. If the tenant had such possession as indicates ownership, the landlord's knowledge of the real ownership will not defeat his remedy. *Reeves v. McKenzie*, 1 Bailey (So. Car.), 497.

A stranger's property may not be taken when it is in possession of the tenant in the way of his trade. As materials to be manufactured or the manufacture therefrom, *Hoskins v. Paul*, 9 New Jersey Law, 110; *Knowles v. Pierce*, 5 Delaware, 178; goods on storage, *Briggs v. Large*, 30 Pennsylvania State, 287; or in the hands of a commission merchant to be sold or stored, *Beran v. Crooks*, 7 Watts & Sergeant (Penn.), 452; *Owen v. Boyle*, 22 Maine, 47; *Connah v. Hale*, 23 Wendell (New York), 462; or a horse at livery, *Youngblood v. Lowry*, 2 McCord (So. Car.), 39; 13 Am. Dec. 698; cotton sent to be pressed, *Rea v. Burt*, 8 Louisiana, 509; goods in an auction store for sale, *Himeley v. Wyatt*, 1 Bay (So. Car.), 102, although the auctioneer has made advances on them. *Re Bailey*, 2 Federal Reporter, 850. But otherwise when consigned to be sold at a certain price, without charge for storage, the tenant to have all he can make above that price. *Goodrich v. Bodley*, 35 Louisiana Annual, 525.

Among articles exempt at common-law are necessary cooking utensils of a householder, *Van Sickler v. Jacobs*, 14 Johnson (New York), 434; account books of a merchant or shopkeeper. *Davis v. Arledge*, 3 Hill (So. Car.), 170.

Goods sold by the tenant to his successor or others are not distrainable, *Clifford v. Beems*, 3 Watts (Penn.), 246; *Neale v. Claulice*, 7 Harris & Johnson (Maryland), 372; unless allowed to remain on the premises an unreasonable length of time, *Gilbert v. Moody*, 17 Wendell (New York), 354.

Goods of the tenant levied on by execution but not removed are distrainable. *Newell v. Clark*, 46 New Jersey Law, 363.

All these matters are much regulated by local statutes. See note, 17 Am. Dec. 458. "The tendency of our decisions is upon the whole against the right of distraining goods not the property of the tenant." Taylor on Landlord and Tenant, sect. 581. "In the case of *Brown v. Sims*, 17 Sergeant & Rawle, 138, Ch. J. GIBSON said: 'The right to distrain the property of a stranger rests on no principle of reason or justice. It is a feudal prerogative handed down from times when chattels were of little account, and when it may have been impolitic, if not unreasonable, to embarrass the lord with responsibility to one who had thrust his property in the way of the remedy to compel a performance of the services. But commerce, which wrought a change in the habits and pursuits of men, and gave an importance to personal transactions, necessarily produced a relaxation of the rule, so as to admit of a variety of exceptions, some of them of early origin, in favour of trade. These have been so often enumerated that it would be useless to pass them in review here, particularly as no two of the judges seem to have taken the same view of the principles applicable to them, or of the ground on which they were sustained. But be this as it may, there is little reason to doubt that the exceptions will, in the end, eat out the rule. The most plausible argument in support of it is that as the landlord is supposed to have given

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credit to a visible stock on the premises, he ought to be allowed recourse to everything he finds there. But this recourse cannot be presumed to have been in the view of the parties, where it would defeat the very object of the contract. . . . Where the course of the business must necessarily put the tenant in possession of the property of his customer, it would be against the plainest dictates of honesty and conscience to permit the landlord to use him as a decoy, and pounce upon whatever should be brought within his grasp, after having received the price of its exemption in the enhanced value of the rent.' And BAY, J., in delivering the opinion of the Court in *Youngblood v. Lowry*, 2 McCord (S. Carolina), 39; 13 Am. Dec. 698, said: 'I am very much disposed to think that this whole system of distress for rent was inapplicable to the circumstances originally of the British colonies, where the ancient feudal system was utterly unknown, and nothing but colonial dependence could have permitted it to gain a footing in America in subservience to British policy.' "

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DISTRIBUTION.

(Statute of 22 & 23 Car. II. c. 10.)

As to Advancement see No. 1 of "ADVANCEMENT," and notes, 2 R. C. 251 *et seq.*

IN RE ROSS'S TRUSTS.

(V. C. WICKENS, 1871.)

RULE.

UNDER the Statute of Distributions the division amongst descendants is *per stirpes*.

Where the nearest of kin are brothers and sisters and there are also children of deceased brothers and sisters, the latter, though not the next of kin, may claim as representatives of the brother or sister from whom they spring, and may stand in the place of that brother or sister for the purpose of distribution. This privilege of representation does not extend to any more remote descendants of brothers and sisters than children, and does not apply to any case where the next of kin are all more remote than brothers and sisters.

In other cases, collaterals equally near of kin take *per capita*.

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41 L. J. Ch. 130-134 (s. c. L. R., 13 Eq. 286).

Distributions (Statute of). — Lineal Descendants. — Division per stirpes.

[130] If an intestate leaves no children, but grandchildren and great-grandchildren only, they take *per stirpes* and not *per capita*.

Petition. — Alexander Ross by his will, dated the 7th of November, 1819, bequeathed a share of personal estate upon trust for each of his daughters, Margaret Ross and Mary Ross, for her

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life, with limitations in favour of her children or child; and directed that if there should be no such child, then, after the *decease of such respective daughter, and such failure [*131] of her issue, the share so respectively allotted to her as aforesaid, should go over and be in trust for the person or persons, who under the statutes made for the distribution of the estates of intestates would then be entitled thereto, in case he (the testator) was then to die possessed thereof, and intestate, and to be divided between or among such persons, if more than one, in the proportions in which the same would be divisible by virtue of the same statutes. The testator then appointed his trustees to be his executors.

He died on the 27th November, 1819, and his will was afterwards duly proved.

He left his widow and five children, three sons, Alexander Ross, Thomas Ross, and William Francis Ross, and the two daughters named in his will, and no more, him surviving.

Alexander Ross, the son, died in 1842. He was twice married. By his first wife he had three children, who died infants, and unmarried. By his second wife he had three children, viz.:—Frederic Dumaresq Ross; the petitioner, Mary Dumaresq (now) M. D. Fletcher; and the petitioner, Georgina Emily Howard (now) G. E. H. Child. Frederic Dumaresq Ross died in 1868, leaving an only child, the infant petitioner, Margaret Mary Dumaresq Ross.

Thomas Ross died a bachelor in March, 1855.

William Francis died in April, 1855, leaving four children, viz.: William, Emma Margaret, Thomas, and Grace. William died in December, 1870, leaving two sons, the respondents, William Henry Ross and Francis Ross. Emma Margaret married James Selby, and they were respondents to this petition. Thomas Ross was also a respondent to it. Grace married Edward Selby, and died in 1870, leaving four infant children, viz.: the respondents Emma Selby, Alice Mary Selby, Francis James Selby, and Edmond Wallace Selby.

The testator's widow died in 1857.

Mary Ross died a spinster in October, 1859. Margaret Ross died a spinster on the 8th June, 1871.

The share of Margaret Ross in the testator's estate was now represented by the sum of £9000 15s. 11d., £3 per Cent. Con-

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solidated Bank Annuities, which in November, 1871, had been paid into court, to an account entitled "In the matter of the trusts of the will of Alexander Ross deceased, the share bequeathed to Margaret Ross, with remainders over."

The question was how that fund was to be divided between the claimants to it, all of whom were either grandchildren or great-grandchildren of the testator?

This petition was therefore presented by Margaret Mary Dumaesq Ross, the infant (by her mother as her next friend), the Rev. Thomas Fletcher and Mary Dumaesq, his wife, and Percy Wheeler Child and Georgina Emily Howard, his wife, praying (after providing for costs), that the residue of the sum of £9000 15s. 11d., £3 per Cent. Consolidated Bank Annuities, might be divided into moieties; that one-third of one of such moieties might be carried over to the account of the petitioner, Margaret Mary Dumaesq Ross, an infant under the age of twenty-one years; that another third of such moiety might be transferred to the petitioner, the Rev. Thomas Fletcher, in right of his wife; that the remaining third of such moiety might be transferred to the petitioner, Percy Wheeler Child, in right of his wife: and that the other of such moieties might be divided amongst or applied for the benefit of the several persons claiming under the testator's son, William Francis Ross; or else that the trust fund might be divided between the petitioners and the several other persons interested therein, in such shares and proportions, as they were respectively entitled to; or for such further or other order as should be deemed meet.

Mr. Greene and Mr. F. C. J. Millar, for the petitioners. — According to the true construction of the Statute of Distributions, 22 & 23 Car. II. c. 10. ss. 5 & 6, the fund must be divided into moieties, and each moiety be then again divided among the descendants of Alexander, the one son, and William Francis, the other son of the testator. But as those descendants consist of both grandchildren and great-grandchildren of the testator, they must take as representing their respective parents, and not [* 132] in their own right as * his next-of-kin, — *i. e.*, they must take *per stirpes*, and not *per capita* —

Darers v. Deares, 3 P. Wms. 49 (note D); 2 Williams on Executors, edit. 1867, 1385, 1386; *Lloyd v. Trench*, 2 Ves. 213. But Toller on Executors, edit. 1833, 874, is contradicted by Burton's

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Comp. Real Property, 8th edit., 433, note, *et sequentia*; and Watkins on Descents, edit. 1837, 259.

The petitioners are therefore entitled to their moiety, and each of them to one-third of it, the infant petitioner as representing her father.

Mr. Bedwell, for the respondents, William Henry Ross, Francis Ross, great-grandchildren, and James Selby and Emma Margaret, his wife, and Thomas Ross, grandchildren, claiming under William Francis Ross, the son. The case is a mixed one, where persons are entitled both *per stirpes* and *per capita*. If there had been only grandchildren, or only great-grandchildren, the division of the fund must have been *per capita*. The statute, s. 5, does not contemplate lineal descendants beyond grandchildren, and therefore the fund ought now to be divided into sevenths, because there were seven grandchildren entitled to take, *per capita*, as next-of-kin. The great-grandchildren will thus take their parents' shares, *jure representationis*, — i. e., *per stirpes*. There is no case reported which is exactly like this one.

Mr. Everitt was for the respondents, the four children of Edward and Grace Selby, also great-grandchildren of the testator, claiming through William Francis Ross.

Mr. Methold was for the trustees.

Mr. Greene, in reply. — The Statute of Distributions never mentions next-of-kin, as taking *per capita*, until it has exhausted all the lineal descendants of the intestate, which proves that so long as such descendants exist, children of children and grandchildren of children are, in such a case as this, only intended to take *per stirpes*. The fund must, therefore, be distributed as the petitioners insist.

WICKENS, V. C. The question reserved for judgment in this case is one as to the operation of the Statute of Distributions where a testator, in the position of an intestate, left grandchildren and great-grandchildren, but no children.

Alexander Ross, by his will dated the 17th of November, 1819, gave one-fifth of his residuary estate to his daughter, Margaret Ross, for life, with remainder to her children, and in default, "in trust for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled thereto, in case I were then to die possessed thereof, and intestate, and to be divided between and among such persons, if

more than one, in the proportions in which the same would be divisible by virtue of the same statutes."

Margaret Ross died on the 8th of June, 1871, unmarried. The testator died in November, 1819, leaving five children, of whom Margaret was the youngest.

Of these the second and fourth died before 1871, without issue. Alexander, the eldest son, had three children, of whom two survived him in June, 1871, and one died before June, 1871, leaving a daughter still living. William Francis, the third son of the testator, and the only one besides Alexander who left descendants living in 1871, had four children, viz., William, who died in December, 1870, leaving two children, now living; Emma Margaret, and Thomas, who are both still living; and Grace, who died in January, 1870, leaving four children, now living.

Therefore, in June, 1871, there were two subsisting lines of the testator's descendants, the one springing from Alexander Ross the younger, and represented by two grandchildren of the testator, and one great-grandchild, the only child of a deceased grandchild; the other springing from William Francis Ross and represented by two grandchildren of the testator; two great-grandchildren, springing from his dead grandchild, William; and four great-grandchildren, springing from his dead grandchild, Grace. The question on the petition is as to the shares in which Alexander

Ross's estate is to be distributed among those persons.

[*133] *It is singular that a question of this sort should be uncovered by judicial authority, but no case bearing on it was cited at the bar, and I have been able to find none.

The Statute of Distributions deals separately with the case of descendants, and that of next-of-kin, not descendants. The case of children is provided for by the 5th section (which is referred to in the 3rd), and the case of next-of-kin not being descendants by the 6th and 7th sections. The general effect of the provisions is that (supposing there to be no wife) the estate, in case there are descendants, shall go between the children and their representatives; and in case there are no descendants, shall go amongst the next-of-kin or their representatives; and that the division is, *per capita*, where all the takers claim in their own right; and *per stirpes*, where they or some of them claim as representatives of another person.

It has been long settled that the word "representatives" in this Act includes only descendants.

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It has been further settled that where all the persons entitled to claim are collaterals, equally near of kin — for instance, second cousins twice removed — they take *per capita*, because they all take in their own right; but that where there are no ancestors or descendants, and the nearest of kin are brothers and sisters, but there are also children of dead brothers and sisters, the latter, though not of the next-of-kin, may claim as representatives of the brother or sister from whom they spring; and may stand in the place of that brother or sister for the purpose of distribution, so that the distribution is *per stirpes*. This privilege is expressly limited by the statute, and does not extend to any more remote descendants of brothers and sisters than their children, and does not apply at all to any case where the next-of-kin are all more remote than brothers and sisters.

There are, therefore, two cases provided for by the statute, — namely, first, where there are children, or the representatives, that is to say, the descendants of children; second, where there are no descendants.

It is the former case alone that has to be dealt with here. Considering the question as one solely on the construction of the statute, it is difficult, I think, to resist the conclusion that if there are descendants, but no children living to share the estate, it is to be divided into as many shares as there were children who have left living descendants, and that the descendants of each such child are to take as representing the child, and of course only the child's share.

It is more or less corroborative of this view that the Statute of Distributions was drawn by a civilian — Sir Walter Walker (see 1 Ld. Raym. 574) — and seems to have been intended to introduce the rules of the Roman civil law into this branch of English law.

It is, therefore, perhaps not irrelevant to remark that the view of the construction of the statute which is taken above, makes it conformable to the Roman law. It will be sufficient for this purpose to refer to the 118th Novell; and as Commentaries, to the Elements of Heineccius (part vi., appendix, § lxxv, edition 1778), and Mühlénbruch's *Doctrina Pandectarum*, Placitum 632. Citations to the same effect might, I think, be multiplied to any extent.

The principal difficulty in the case is this: in Toller on Executors — which may almost be called the received text-book on the subject — a different opinion is expressed. In the 7th edition by

Whitmarsh (1838) — the passage is at page 374 — various authorities are cited for this, but none of them apply to the case of descendants. The *dictum* is transferred into Williams on Executors, where, in the 6th edition (1867), it occurs in page 1385. But it appears to stand there on the authority of Toller only, since the only cases cited are those cited by Toller and irrelevant.

On the other hand, there is a remarkable passage in Hargrave's Jurisconsult Exercitations, 270-272, in which (speaking of Dr. Harris's Justinian) he tries to assert what would seem to be the true construction of the statute. A similar view is to be found in Burton's Compendium, Placitum 1403, which was, I believe, published about 1830, and has gone through numerous editions.

And the true principle is stated in Blackstone and many [* 134] other * text-books, though the special distinction between descendants who can take only as children, or representatives of children, and next-of-kin who take in their own right, however remote, is not pointed out.

The text-books are not, strictly speaking, authorities on such a point, but had there been an absolute consent among them, on a point likely to be of such frequent occurrence, one would have hesitated to pronounce an opinion in opposition to what might seem to be an established course of distribution. It is, however, impossible to say, in the face of the passage from Hargrave, which has been often referred to, and of the statement in all the editions of a popular elementary work like Burton, that there has been such a consent.

Feeling, therefore, free to follow my own clear opinion on the construction of the statute, I hold that in this case the sum in question is divisible into moieties, of which one is divisible among the descendants of Alexander Ross, the younger, and the other divisible among the descendants of William Francis Ross, the division among each class being in each case *per stirpes*.

ENGLISH NOTES.

The first branch of the rule is confirmed by the judgment of Mr. Justice NORTH in *Re Natt, Walker v. Gammage* (1888) 37 Ch. D. 517, 57 L. J. Ch. 797, 58 L. T. 722, 36 W. R. 548, which lays down the rule that the division of personal estate among descendants of an intestate, whether in the same or in different degrees, is always to be *per stirpes*; and cites the principal case as an authority. In this case of *In re Natt*,

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Walker v. Gummage, a share of the residuary estate of a testatrix, which she had purported to give by her will, lapsed. She had two children, a son and a daughter, both of whom died before her. Three children of the son and one child of the daughter survived the testatrix. It was held that the four grandchildren took the lapsed share, so far as it consisted of personal estate, *per stirpes*.

A testator directed that the residue of his property should, at the death of his wife, or at the expiration of ten years from his death, whichever should last happen, be held by his trustees on trust, in default of previous gifts and in the events which happened, as to one moiety for his relations by blood then living other than and except his son W. who would then be his next of kin according to the Statute of Distributions if his son W. were then dead, such persons if more than one to take as tenants in common in the shares prescribed by the said statutes; and, as to the other moiety, for his relations by blood then living other than and except his son G. who would then be his next of kin according to the statutes of distribution if his son G. were then dead, such persons, if more than one, to take as tenants in common in the shares prescribed by the said statutes. The testator had two sons, W. and G. Both died within the period of ten years. W. left a widow and three children. G. left a widow and one child. The four grandchildren were alive at the expiration of the period of ten years. It was held that the persons to take the property in default of the prior gifts were to be ascertained at the expiration of the ten years from the death of the testator, and that it was divisible between the grandchildren *per stirpes*. *Valentine v. Fitzsimons* (M. R. for Ireland, 14 Feb. 1893), 1894. 1 Ir. Ch. 93.

AMERICAN NOTES.

This subject is so generally regulated by statute in the United States that it would not be useful to do more than point out their common trend. The usual provision of the statutes is that where the nearest of kin are brothers and sisters, the estate shall go to them and to the "children" or "issue" of deceased brothers and sisters. In most of the States the right of representation is denied to descendants of collateral relatives generally. In some it is expressly denied to collaterals after brothers' and sisters' children. Where it is limited to grandchildren of deceased brothers and sisters, a surviving brother takes to the exclusion of the great-grandchildren of a deceased sister. *Stetson v. Eastman*, 84 Maine, 366. Where the provision is that in default of issue, parent, or brother, or sister, the next of kin in equal degree shall take, this gives the estate to children of deceased brothers or sisters to the exclusion of children of deceased nephews or nieces. *Conant v. Kent*, 130 Massachusetts, 178.

Some statutes expressly provide for the manner of taking, whether *per*

No. 1. — In re Ross's Trusts. — Notes.

stirpes or *per capita*. The effect of these restrictive provisions is to qualify the right of representation among collaterals, so that relatives further removed from the intestate take only as next of kin *per capita*. *Davis v. Vanderwever's Adm'r*, 23 New Jersey Equity, 558, where the Court said: "It has been well settled by the Courts in England for over a century and a half, and always acted upon, so far as anything to the contrary appears, since the passage of the Act" (22 & 23 Car. II. ch. 10), "that the effect of it is to limit or qualify the right of representation among collaterals, so that they can take only as next of kin, *per capita*, except in the one case of children of deceased brothers and sisters, among whom alone of the collaterals the right to take *per stirpes* by way of representation may exist." Citing many old English cases, 2 Kent's Commentaries, 425, and the principal case. "This construction of the English statute was well understood when our Act was adopted, and since then it has been recognized in our treatises in common use, and been approved of by the learned of the Bar." *Brown v. Taylor*, 62 Indiana, 295; *Crump v. Faucett*, 70 North Carolina, 345; *Odum v. Caruthers*, 6 Georgia, 39; *Cremers's Estate*, 156 Pennsylvania State, 40.

Where relatives within the limits prescribed for representation are in equal degree, they take *per capita*, but when they stand in unequal degree, or claim by representation, they take *per stirpes*. *Kelly's Heirs v. McGuire*, 15 Arkansas, 555; *Blake v. Blake*, 85 Indiana, 65. So when the next of kin are nephews and nieces, children of different brothers or sisters, they take *per capita*. *Baker v. Bourne*, 127 Indiana, 466; *Snow v. Snow*, 111 Massachusetts, 389; *Nichols v. Shepard*, 63 New Hampshire, 391; *Wagner v. Sharp*, 33 New Jersey Equity, 520; *Miller's Appeal*, 40 Pennsylvania State, 387; *Stent v. McLeod's Ex'rs*, 2 McCord Equity (So. Car.), 354; *Pond v. Bergh*, 10 Paige (New York Chancery), 110 (otherwise formerly, *Jackson v. Thurman*, 6 Johnson, 322); *Houston v. Davidson*, 45 Georgia, 574.

If a collateral claims in his own right by reason of propinquity to the intestate, and other collaterals claim by virtue of representation of a deceased ancestor in the same degree of relationship with the former, the latter take *per stirpes* and the former *per capita*. So if the collaterals are nephews and nieces and grand-nephews and grand-nieces, the former take *per capita* and the latter *per stirpes*. *Garrett v. Bean*, 51 Arkansas, 52; *Blake v. Blake*, 85 Indiana, 65; *Batch v. Stone*, 149 Massachusetts, 39; *Copenhaver v. Copenhaver*, 9 Missouri Appeals, 200; 78 Missouri, 55; *Preston v. Cole*, 64 New Hampshire, 459; *Evers v. Follin*, 9 Ohio State, 327; *Kroust's Appeal*, 60 Pennsylvania State, 380; *Davis v. Rowe*, 6 Randolph (Virginia), 355.

In North Carolina and Maryland collateral heirs, even if of equal degree, take *per stirpes*. *Cromartie v. Kemp*, 66 North Carolina, 382; *McComas v. Amos*, 29 Maryland, 132.

Under statutes which deny representation to collaterals after brothers' and sisters' children, grand-nephews and grand-nieces do not take with nephews and nieces. *Van Cleve v. Van Fossen*, 73 Michigan, 342; *Penniman v. Francisco*, 1 Heiskell (Tennessee), 311. So uncles and aunts take to the exclusion of children of deceased uncles and aunts. *Johnston v. Chesson*, 6 Jones Equity (Nor. Car.), 119; *Shaffer v. Nail*, 2 Brevard (S. Car.), 160;

American Notes.

Elwood v. Lannon's Lessee, 27 Maryland, 200; *Parker v. Nims*, 2 New Hampshire, 460; *Bailey v. Ross*, 32 New Jersey Equity, 544; *Herr v. Herr*, 5 Pennsylvania State, 428; 47 Am. Dec. 416 (formerly). First cousins exclude second cousins. *Schenck v. Fail*, 24 New Jersey Equity, 538; *Adee v. Campbell*, 79 New York, 52; *Roger's Appeal*, 131 Pennsylvania State, 382. Grand-uncles and grand-aunts, when next of kin, exclude children and grandchildren of such deceased. *Clayton v. Drake*, 17 Ohio State, 367.

DOG.

See "Animal," Nos. 4 & 6 and notes; 3 R. C. p. 108 *et seq.*; p. 138, p. 142; and No. 7 of "Carrier" 5 R. C. 329 *et seq.*

AMERICAN NOTES.

The rights and wrongs of the American dog are traced to a considerable extent in the former notes. A few questions remain to note.

Whether dogs are property is variously decided. It was held that they are in *Mayor, &c. v. Meigs*, 1 McArthur (District of Columbia), 53; 29 Am. Rep. 578 (the Court relating the incident of William the Prince of Orange's dog, which saved his life); *Harrington v. Miles*, 11 Kansas, 480; 15 Am. Rep. 355; *Heiligman v. Rose*, 81 Texas, 222; 26 Am. St. Rep. 804; 13 Lawyers' Rep. Annotated, 272; *Woolf v. Chalker*, 31 Connecticut, 121; 81 Am. Dec. 175; *Wheatley v. Harris*, 4 Sneed (Tennessee), 468; 70 Am. Dec. 258; *Ten Hopen v. Walker*, 96 Michigan, 236; 35 Am. St. Rep. 598; *Nehr v. State*, 35 Nebraska, 638; 17 Lawyers' Rep. Annotated, 771; *Jenkins v. Ballantyne*, 8 Utah, 245; 16 Lawyers' Rep. Annotated, 689. To the contrary; *Blair v. Forehand*, 100 Massachusetts, 136; 1 Am. Rep. 94; *State v. Harriman*, 75 Maine, 562; 46 Am. Rep. 423 (killing "domestic animals"). Even if dogs are regarded as property, they do not come within a statute against "injuring or destroying public or private property." *Patton v. State*, 93 Georgia, 111; 24 Lawyers' Rep. Annotated, 732.

Larceny does not lie for taking a dog. *State v. Lynms*, 26 Ohio State, 400; 20 Am. Rep. 772; *Ward v. State*, 48 Alabama, 161; 17 Am. Rep. 31; *State v. Holder*, 81 North Carolina, 527; *State v. Doe*, 79 Indiana, 9; 41 Am. Rep. 599.

But otherwise, as "goods and chattels." *State v. Brown*, 9 Baxter (Tennessee), 53; or a "thing of value," *State v. Yates*, Ohio Common Pleas.

The law looks tenderly on women and children who meddle with dogs. So it was held not conclusively negligent when an infant of thirteen struck a dog, *Plumley v. Birge*, 124 Massachusetts, 57; or meddled with a whip in a vehicle in charge of which the dog was left, *Meibus v. Dodge*, 38 Wisconsin, 300; 20 Am. Rep. 6; and when a woman spoke to a dog without an introduction, *Searles v. Ladd*, 123 Massachusetts, 580; or offered one candy, *Lynch v. McNally*, 73 New York, 347.

American Notes.

As a *dernier ressort*, one may kill a dog that habitually howls at night and disturbs his slumbers and the peace of his family, *Brill v. Flagler*, 23 Wendell (New York), 354; the Court observing: "It would be mockery to refer a party to his remedy by action; it is far too dilatory and impotent for the exigency of the case." So in *Hubbard v. Preston*, 90 Michigan, 221; 30 Am. St. Rep. 426; 4 Green Bag, 279; 15 Lawyers' Rep. Annotated, 249; *Meneley v. Carson*, 55 Illinois Appeals, 74. But not so where the dog simply barked, chased cats into trees, got into the hen-house once, and left tracks on a freshly painted porch. *Bowers v. Horen*, 93 Michigan, 420; 32 Am. St. Rep. 513; 17 Lawyers' Rep. Annotated, 773. One may kill a dog that repeatedly springs at and frightens his horse on the highway. *Quigley v. Pudsey*, 26 Nova Scotia, 240.

A valuable Irish setter dog may be killed if trespassing and endangering one's chickens, — "Plymouths," *Anderson v. Smith*, 7 Bradwell (Illinois Appellate), 354. The Court admitted it would be unjustifiable to kill a valuable horse in the same circumstances, but saw no reason against exterminating a cat. It is a felony in Texas to kill a dog worth more than twenty dollars.

In *Wiley v. Slater*, 22 Barbour, 506, the Supreme Court of New York held an action was not maintainable by the owner of a dog for injuries inflicted on it by another dog in a voluntary and fair contest for supremacy in the absence of their masters. The Court said: "This is the first time I have been called on to administer the law in the case of a pure dog fight, or a fight in which the dogs, instead of the owners, were the principal actors. I have had occasion to preside upon the trial of actions for assaults and batteries, originating in affrays in which the masters of dogs have borne a conspicuous part, and acquitted themselves in a manner which might well have aroused the envy of their canine defendants. . . . I am constrained to admit total ignorance of the code *duello* among dogs. . . . I have been a firm believer with the poet in the intuitive if not semi-divine right of dogs to fight," quoting Dr. Watts. "The courtesies and hospitalities of dog life cannot well be regulated by the judicial tribunals of the land. . . . The owner of the dead dog would, I think, be very clearly entitled to the skin, although some, less liberal, would be disposed to award it as a trophy to the victor; and this rule would ordinarily be a full equivalent for the loss."

One whose sheep have been killed by dogs may spread poisoned meat for them, but is liable in damages if he thereby kills an innocent dog. *Gillum v. Sisson*, 53 Missouri Appeals, 516.

On the whole, the dog is much less tenderly treated by the judiciary of this country than in England. Very hostile sentiments were uttered against him in *Godeau v. Blood*, 52 Vermont, 251; 36 Am. Rep. 751, and in *Cranston v. Mayor*, 61 Georgia, 578. Judge BLECKLEY says, They "have not had their exact legal relations adjusted in this State, and they and their owners are destined perhaps to a career of trouble for some years to come."

No 1. — **Whicker v. Hume**, 7 H. L. Cas. 124, 125. — Rule.

DOMICIL.

[NOTE. — Questions as to the effect of domicile are treated under the head of “Conflict of Laws,” 5 R. C. 747 *et seq.* The following cases are selected as showing the facts which are evidence of domicile.]

No. 1. — **WHICKER v. HUME.**

(H. L. 1858.)

RULE.

DOMICIL means “permanent home.”

Whicker v. Hume.

7 H. L. Cas. 124–167 (s. c. 28 L. J. Ch. 396; 4 Jur. n. s. 933).

A native of Scotland, after being in India for twenty years in the service of the East India Company, came to England and subsequently returned to Scotland, where he took a house and married. After about eleven years' residence in Scotland, he quitted that country, with the intention as shown by his declarations and acts of not resuming any permanent residence there; and subsequently he removed his books and household goods to London. On first coming to London he lived in furnished lodgings, but subsequently took a furnished house, where he lived with his wife for about twelve years. He went with his wife on several visits to the Continent, and on the last occasion remained on the Continent, with the exception of a short interval for about seven years, until his death. But it was found that during all these times of visiting or staying on the Continent, he regarded London as his home, and considered himself to be only absent from London on account of his health and pecuniary circumstances, and contemplated returning there as soon as his health and circumstances would permit. And that he always left his library, furniture, and moveable property in London and made his arrangements so as to show that he intended to be absent for a short time only. *Held*, that he was domiciled in London at the time of his death.

John Hay Gilchrist was born in Edinburgh, in June, [125] 1759. In 1775 he went to the West Indies, remained there two years, and then returned to Edinburgh. In 1782 he went to the East Indies and entered into the company's service. He acted at first as a surgeon; but afterwards devoted himself to the study of the Hindostanee and Persian languages, and was appointed to give lessons in them to the junior civil servants of the company. On the establishment of the College of Fort Wil-

liam in Calcutta, he was appointed Professor of Hindostanee there, and held that appointment till 1804, when he resigned it and came to England, his then intention being merely to recruit his health. He never returned to India. He received a pension from the company for past services. In 1804 he presented to George Heriot's Hospital, Edinburgh, the sum of £100 "as a small testimony of gratitude for his education there." He got himself admitted a burgess and guild brother of the city, had his armorial bearings recorded in the office of Lyon King of Arms, obtained a diploma of the company of James VI., and in 1804 embarked in the wholesale linen trade at Edinburgh. During all this time, however, his principal actual residence was in the neighbourhood of London. He busied himself about literature, and on the 22d February, 1806, was appointed Professor of Oriental

Languages at Haileybury, but resigned that appointment a [*126] few *months afterwards. Claiming to be connected with the noble Scotch family of Borthwick, he obtained a licence under the sign-manual to use the name of Borthwick, in addition to his own, and procured a grant of arms from the Herald's College, in which he was described as "John Borthwick Gilchrist, of Camberwell, in the county of Surrey, Doctor of Laws, late Professor of the Hindostanee language in the College of Fort William, at Calcutta." In the latter end of 1806 he went to Edinburgh, enrolled his name on the books of the municipality, and entered into business as a banker, with James Inglis, for 14 years, to commence from 1 January, 1807, with a proviso, that either party might dissolve the partnership at the end of the seventh year. In 1808, he married a Scotch lady, and had a residence in Nicholson Square, and became a member of several societies established in Edinburgh. In 1815, the banking partnership, which was not successful, was dissolved, as from the 30th June of that year. In June, 1817, on account of some real or supposed affront, he quitted Edinburgh and came to London. In 1818, he again obtained from the East India Company the appointment of professor and lecturer in Hindostanee. These labours in teaching Oriental languages had for their chief object to sell his books on that subject, which had always remained in London. This continued till the 20th June, 1825, during the course of which time he wrote letters declaring his intention never to see "Auld Reekie again," and, speaking on occasion of a

particular matter which had occurred in Edinburgh, he described it as “a blow which dissolution cannot efface from the conscious retrospective mind, wherever it may wing its flight, and one that impels me to disown and deny my country as a tyrannical step-mother, to whom, since my return after a long absence, I owe nought save the deepest disgust.” He sold his house at Edinburgh, and most of his furniture; but brought the rest to London; he likewise removed his *name from the books [*127] of the municipality and from the various societies of which he had previously become a member. He visited Edinburgh once or twice afterwards during the life of his mother, and memorialised the sheriff depute and the inhabitants of Nicholson-square to have the name changed into Borthwick-square, but he was unsuccessful in his object, and he never expressed any intention of returning to reside in Edinburgh. In 1826, he took part in establishing the University of London, became a proprietor of shares therein, and accepted the office of professor of Hindostance to the University, but resigned that office in 1828, and became a private lecturer on Oriental language. In 1833, he set up in London a newspaper, which failed; and in January, 1834, he executed in London a will according to the English forms. He had in the meantime paid some short visits to the Continent, but in May, 1834, he went to reside near Paris; and before going, wrote a letter, in which he said his reason for going to the Continent was that he was unwilling prematurely to expose either his wife or himself to those annoyances in the metropolis, where for six months they had both suffered severely in body and mind, also to say nothing of his purse, which his arch enemy was determined to sink to the lowest ebb, to torment him while labouring under a complication of evils, and one of them a dangerous disease, “when he was very far from having yet escaped, and that to flee from similar visitations in future, was the grand object of his wish, and he had requested his kind helpmate to cross the channel once more in search of that tranquillity which he could not expect in his own country, while beset as he had been by needy and greedy blood relations, all sighing for his death.”

In July, 1837, he took a residence, with coach-house and stables, at Paris, on lease for three, six, or nine years,

*determinable on six months’ notice given before the [*128] expiration of the three or the six years. The lease also

contained the following proviso, not to assign “in whole or in part without the consent, in writing, of the lessor. Only in the case of unforeseen events which shall force the lessee to quit Paris, or in another case also unforeseen, the interests of his family, the house may be let conjointly by the lessor and the lessee, the latter remaining responsible for the rent; or even the present lease may be cancelled at the end of six months’ notice after one year of holding; and provided that the hiring shall only cease in the month of January.” In 1840, being in London, he instructed his solicitor to prepare a will for him, which was accordingly done in the common form, and sent to Paris; but before its arrival there, Mr. Lawson, an English solicitor, practising at Paris, had prepared another. On the arrival of the English will, a codicil was added by Mr. Lawson, and the will and codicil were both executed on the 8th December, 1840. The description of the testator inserted in the will was, “J. B. Gilchrist, of the city of Edinburgh, but now residing at 10 Rue Mategnon, in the city of Paris.” At the time of making his will, he was possessed of the following property: A freehold estate at Sydney, New South Wales; a freehold flat, or floor, in Hunter Street, Edinburgh; 100 shares in the Commercial Bank of Scotland, valued at £17,450; and £2,000 capital stock of the Bank of England; household furniture in Paris; and 5842 copies of his Oriental works, and some ornamental furniture, which were in London, the last having been expressly left with friends to keep till his “return” to London.

The will gave to his wife his household goods, — furniture and plate, linen, glass, china, carriage, horses, jewels, trinkets, wines, &c. — and money in his house for her absolute use and benefit. And his estate at Sydney and in Edinburgh, and all his residuary real and personal estate, he gave to Joseph Hume, Esq., M. P., Charles Holland, Esq. M. D., John Macgregor, Esq., one of the Secretaries of the Board of Trade, and John Bowring, Esq., LL. D. (all of London); and Robert Veritz, Esq. M. D., of Paris, physician to the British embassy there, on trust to convert the same into money, and to invest the produce (but so that it might be disposed of to charitable purposes), on trust to pay certain annuities, and then on such trusts as by any codicil he might direct. By the codicil he directed and appointed “that the trustees or trustee for the time being shall

stand possessed of and interested in the residue or surplus of the trust monies, stocks, funds, and securities thereby to them bequeathed in trust. Upon trust to apply and appropriate the same in such manner as they, my said trustees or trustee, shall in their absolute and uncontrolled discretion think proper and expedient *for the benefit, and advancement, and propagation of education and learning in every part of the world*, as far as circumstances will permit."

The testator died at Paris on the 8th January, 1841, and on the 13th January the will and codicil were proved by all the executors except Dr. Veritz in the Prerogative Court of Canterbury. In August, 1841, they were duly registered and confirmed in Scotland.

On the 30th of July, 1841, the appellant as the heir-at-law and one of the next of kin of the testator, filed his bill (which was afterwards amended) in Chancery against the executors (and other necessary parties), and the Attorney-General, alleging that, by the law of Scotland, the real estate of the testator did not pass by the will and codicil, that the real estate at New South Wales did not pass *thereby, but that all the real estate, [*130] after satisfying lawful charges thereon, belonged to the heir-at-law; that the trusts thereof were inoperative and void; that the residuary estate was undisposed of, and that, subject to the debts of the testator, the same by the law of the testator's domicile, belonged to his next-of-kin (exclusive of the widow's interest) and he prayed for a declaration accordingly, and for an account.

In November, 1842, the executors filed their bill praying that it might be declared that the will was well proved, and that the trusts thereof ought to be carried into effect.

By an order of the Court made in both causes, in January, 1843, it was referred to Master Richards to inquire where the testator was domiciled at the time of his death, and who were his heir-at-law and next-of-kin. In December, 1844, the Master reported, that the Appellant was his heir-at-law, and that certain other persons were his next-of-kin; and in November, 1849, he made a farther report, by which he found that the testator was domiciled in London.

The appellant excepted to this report, insisting that it ought to have been found, that the domicile was either Scotch or French. The exceptions were overruled by Lord LANGDALE (January, 1851,

13 Beav. 366). The cause was heard before Sir JOHN ROMILLY, who (April 30, 1851), declared the will to contain a good charitable bequest, and decreed accordingly (14 Beav. 509). The case was taken on appeal before the Lords Justices, and the decree of the MASTER OF THE ROLLS affirmed (1 De G. M. & G. 506). The present appeal was then brought against both these decrees.

[* 131] * Mr. Rolt and Mr. Greene (Mr. Morris and Mr. Springall Thompson were with them) for the appellant.

[138] Mr. R. Palmer (Mr. Anderson and Mr. Bagshawe were with him) for the respondents.

The Solicitor-General (Sir H. Cairns), with whom was Mr. Wilkins, was heard in support of the validity of the will.

Mr. Rolt replied.

[* 143] * The LORD CHANCELLOR (LORD CHELMSFORD) after stating the terms of the will and codicil, said : —

Upon the argument at the Bar three main questions were raised : first, upon the domicile of the testator ; secondly, whether the Statute of Mortmain, 9 Geo. II. c. 36, applied to a devise of lands, situated in New South Wales, and rendered the devise for charitable uses void ; and, thirdly, whether the trust upon which the residue was given, constituted a valid charitable bequest. Upon the point of domicile, an objection was made on the part of the respondents, that it was not competent to the appellant to enter into that question, inasmuch as it was concluded by the probate of the will which had been granted by the Prerogative Court. And it is necessary, therefore, very shortly, to consider what is the effect of a grant of probate upon a question of this kind.

Now, there is no doubt that it is the province and the duty of the Ecclesiastical Court to ascertain what was the domicile of the party whose will is offered for probate, in order to ascertain whether that is a valid will, the testator having complied with all the requisites of the law of the country in which he was domiciled. But if probate is granted of a will, then that conclusively establishes in all Courts that the will was executed according to the law of the country where the testator was domiciled. Supposing the fact to be, that the testator was domiciled in a foreign country, and the will was not executed according to the law of that country, still, if it had been admitted to probate by the proper Ecclesiastical Court here, no other Court could go back upon the

factum and raise any question with respect to the validity of the will.

That seems to be exemplified and established by the case of *Douglas v. Cooper*, 3 My. & K. 378. There a married woman, under *the power of appointment in a marriage [*144] settlement, which was to be exercised by a will to be executed with certain formalities, made an instrument, which was admitted to probate by the Ecclesiastical Court, and the MASTER OF THE ROLLS held that he was concluded by the judgment of the Ecclesiastical Court granting probate, from considering the question, whether it was a will; namely, whether it was such an instrument as was required by the power, and that the office and duty of the Court were confined to the consideration of the question, whether that instrument was executed with the formalities which were required by the powers.

Therefore, I apprehend, that this will having been admitted to probate, it must be taken to be a valid will wherever it shall turn out that the testator was residing at the time of his death, but that the place of domicile is still open for consideration, and also the validity of the bequest contained in the will, and the effect of it according to the law of the domicile of the testator. The question, therefore, being open for consideration as to where the testator was domiciled at the time of his death, it will be necessary to enter shortly into the consideration of the evidence upon that subject, upon which I apprehend that your Lordships will feel no very great difficulty.

The testator was a native of Scotland, born there in the year 1759. In the year 1782, being then of the age of 23, he went to India, and shortly afterwards entered into the service of the East India Company as a medical officer. He continued in the service of the East India Company in India till the year 1804, and by his services with the East India Company, he acquired what has been called in several cases an Anglo-Indian domicile. He returned to his native country in the year 1804, married there in 1808, and shortly after his return he retired from the service of *the East India Company upon a pension which he [*145] enjoyed down to the time of his death, which was in the month of January, 1841.

There is no doubt that his domicile of origin revived by his return to, and residence in, his native country. But it is unnee-

essary to pursue the circumstances of that residence, because your Lordships have already intimated a very strong opinion that in the year 1817, and in subsequent years, the circumstances showed that he had relinquished that domicile of origin, and that the real contest was between two alleged subsequently acquired domicils. In the year 1817, as I have already stated, he quitted Scotland, never permanently to return, and established himself in London. He was a person well skilled in Oriental languages and literature; he was the author of several Oriental works, and, at the time he came to London, he had a large stock of those works on hand at his booksellers. And it was alleged that the reason of his coming to London was to promote the sale of those works. He seemed to have considered that the best mode of advancing his object was to give public lectures on Oriental literature; and about the year 1821, he obtained employment from the Directors of the East India Company as Professor of the Hindostanee language, for three years, which was renewed at the expiration of that time for a farther term of three years, and afterwards, for one year, which brings us down to the year 1828. At the expiration of his employment under the East India Company, he lectured gratuitously as it is said, for the purpose of facilitating the same object which he had in view, and which brought him to London.

Upon his first arrival in London with his wife, he went into furnished lodgings, and continued to reside with his wife in furnished lodgings down to the year 1822. He then took a [*146] furnished house in Clarges street at a rent of *£400 a year, and he lived in that house for five years, at the end of which time he removed to another house, No. 38, in the same street, which he occupied for another year. That again brings us down to the year 1828. During the time he was residing in Clarges street, in the years 1825, 1826, and 1827, he made excursions to the Continent, but kept on his house in London, and returned from time to time to his residence. In the year 1828 he went abroad and lived in various parts of the Continent for three years, down to the year 1831. He then again returned to London. He appears to have remained a very short time in London in that year, 1831. He went abroad in the same year, whether for pleasure or for health is wholly immaterial; but he remained abroad upon that last occasion from the year 1831 down to the year 1833, and again he returned to London. In the month of

No. 1. — Whicker v. Hume, 7 H. L. Cas. 146, 147.

May, 1833, he proposed to establish a newspaper, and for that purpose he took a house in the Strand, and he continued to hold that house, having employed persons to assist him in this undertaking or speculation, of a newspaper. He held that house for a year, but the speculation entirely failed. In the year 1834 he abandoned it, and in that year 1834 he quitted England for Paris, and he only returned to England occasionally from the year 1834 down to the period of his death in 1841, — namely, in the years 1839 and 1840.

Now, my Lords, the question is, whether, during the long period which I have mentioned, from the year 1817 down to the year 1834, the testator having clearly abandoned his domicile of origin, he had not acquired a new domicile in England. And I think your Lordships will entertain very little doubt that such a domicile was, in point of fact, acquired. It seems to me, that the nature of his residence and his constant returns from the Continent bring that residence completely within the definition

* of domicile which is given in the Digest, Bk. 50. tit. 16, s. [* 147] 203; “Unde cum profectus est, peregrinari videtur; quod si rediit peregrinari jam destitit.”

If, then, he had acquired a domicile in England, the question is, whether he ever lost that domicile by the acquisition of another. And that will depend upon whether the former domicile had been abandoned by the acquisition of a new one, intentionally and actually, *animo et facto*. And it will be necessary, therefore, to consider what were the circumstances under which it was alleged that the French domicile was acquired. I have stated, that he went abroad in the year 1834. In the year 1837 he took a second floor in the Rue Martignan, in Paris, for a period of three, six, or nine years, determinable, after the first year's occupation, upon a six months' notice, at a rent of 3500 francs, amounting to £140 a year, and with a stipulation that he should place in the apartments sufficient furniture to be a security for the rent. But the question, first of all, arises, did he manifest any intention to abandoning the English domicile which he had acquired?

Now, let us observe what happens with reference to the English domicile. At the time he went abroad, in the year 1834, he left with his solicitor a number of private papers and his library of books. There was a large stock of books still remaining on hand

at his booksellers. I do not lay much stress upon that circumstance. There was an insurance upon the books to the extent of £3000, but, of course, he could not remove them; it would not have answered his object. He also left several trunks and boxes and packages and a bookcase at Holland's warerooms in Great Pulteney street, it appears, where they had been warehoused occasionally from the year 1827, and they were left there [*148] down to the year 1840, he paying *warehouse rent for them during the time. And in the year 1840, nine of those packages were removed to Tilbury's, I think, in High street, Marylebone, where they remained till after the death of the testator, when, a year or two afterwards, they were removed by the widow, and warehouse rent paid for them.

Now, the circumstance of his leaving this property in England appears to me very strongly to indicate an intention to return to this country when circumstances rendered it desirable for him to do so. He was very far advanced in life at that time, and he died at the age of 82; and if he had intended to make France his permanent residence, he would of course have removed all his property, and would never have been at the expense of having to pay warehouse rent for it. And there is one circumstance upon this subject which appears to me to be almost conclusive with respect to the fact of his domicile, in the evidence of Mr. Allen, the bookseller, in which he says, "that on the occasion of the testator's going abroad in or about the year 1839, he deposited with me a handsome ornamental clock and some pictures, in order that I might keep the same for the said testator during his absence, and until his return to London, and that the same remained in my possession at the time of the decease of the said testator." Therefore, I think it is quite clear that there is no evidence whatever of an intention to abandon the domicile which he had clearly acquired in England.

Then, was there any intention to reside permanently in France, so as to acquire a domicile there? Now, I leave out of consideration the expressions which may be scattered here and there through letters which are to be found in the voluminous correspondence printed in the appendix, because I believe your Lordships will find expressions with respect to each country of an intention [*149] to reside *permanently there. I think it is rather more important to consider what is the actual evidence

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upon this subject, upon which it appears to me to be extremely difficult for the appellant now to contend that the domicile was French. For what was the course which he took? When the case was before the MASTER OF THE ROLLS, the appellant does not appear at that time to have ever dreamt of the testator having acquired a French domicile, for the whole of the evidence from the beginning to the end is presented for the purpose of establishing that his heart clung to Scotland, that he had no other views in life but returning there, and dying at home at last.

Now, My Lords, I intimated my opinion, or rather, threw out a suggestion in the course of the argument, that the evidence which was given by the appellant in this respect completely destroyed any evidence in favour of French domicile; that every expression, every indication of a wish and intention to return to Scotland, and end his days there, loosened the idea of his intention to acquire a French domicile. And if your Lordships look through the whole of the evidence upon this subject, I think it will be found, that with the exception of some of the casual expressions, which I have adverted to in the letters, the only evidence which can be rested upon for proof that he then intended to acquire a French domicile, is the arrangement for taking the apartments in Paris for three, six, or nine years, upon which, at all events, he hung with sufficient looseness to enable him to detach himself from them at a very short notice after the first year of occupation.

What, then, is the result? The domicile of origin was abandoned, and a new domicile was acquired by his residence in England; that new domicile was never relinquished, no fresh domicile was obtained in France; consequently, the English domicile remained undisturbed, and *that was the [*150] domicile of the testator at the time of his death.

[As to the second question, the LORD CHANCELLOR considered that a devise of land in New South Wales was not affected by the Mortmain Act, and that a trust "to apply and appropriate the same in such a manner as the said trustees or trustee shall, in their absolute and uncontrolled discretion, think proper and expedient for the benefit, advancement, and propagation of education and learning in every part of the world," was a good charitable bequest.]

Lord CRANWORTH:—

156]

My Lords, my noble and learned friend has gone through

this case so very fully, that it seems to me I shall be best discharging my duty by adding very little to what he has already said. I will, therefore, only allude very briefly to all the different points.

The first question made is one that was extremely important, — namely, the point, whether probate was or was not conclusive evidence of the domicile. Now, I have no hesitation in saying, that the affirmative of that proposition cannot be a correct exposition of the law. A probate is conclusive evidence that the instrument proved was testamentary according to the law of this country. But it proves nothing else. That may be illustrated in this way. Suppose there was a country in which the form of a will was exactly similar to that in this country, but in which no person could give away more than half his property. Such an instrument made in that country by a person there domiciled, when brought to probate here, would be admitted to probate as a matter of course. Probate would be conclusive that it was testamentary, but it would be conclusive of nothing more, for after that there would then arise the question, how is the Court that is to administer the property to ascertain who is entitled to it? For that purpose you must look beyond the probate to know in what country the testator was domiciled, for, by the law of that country, the property must be administered. Therefore, if the testator, in the case I have supposed, had given away all his property, consisting of £10,000, it would be the duty of the Court that [*157] had to construe the will to say *£5000 only can go according to the direction in the will, the other £5000 must go in some other channel. Therefore, I think it is clear, that that proposition is one that cannot be maintained. In truth, however, in the present case, in my opinion, it is utterly unimportant with reference to the result, because, from the first moment when I understood this case, and saw my way into the very great mass of letters and papers and evidence in it, I could not entertain a moment's doubt that there is nothing here to lead to the notion of anything but an English domicile.

I will not go into the circumstances prior to 1817, and only very few of them afterwards; but, in 1817 I think the evidence is conclusive, that this gentleman quitted Scotland, intending to quit it forever. I do not mean that he did not contemplate at some time or other going back again to visit Scotland, but that he

never meant to be otherwise than a non-Scotchman, an Englishman, in truth, because he came and settled himself in London. It is said that he was only in lodgings. That is not true; for five or six of the last years he was in England, he was in a house in Clarges street, first in one, and then in another. I am not prepared to say that it would make any difference if he had been in lodgings only, or, to use a common expression, only lying at single anchor, so that he could easily go away. That may be a circumstance making it less probable that he meant to establish a residence in that place. It is, however, only a circumstance. Why, how many people are there who have lived all their lives in Chambers, in Inns of Court. Nobody can doubt that they are domiciled there, although that may not be the sort of place in which persons marrying or settling are in the habit of being found. This gentleman, however, in 1817, came to London; he was here for four or five years, *at different lodgings, in [*158] Arlington street, and afterwards in two successive houses in Clarges street, all this time prosecuting his avocations in life, endeavouring to make the knowledge which he had acquired, and the works which he had printed, available for profit, and endeavouring to get an increase of income by pensions from the East India Company; in short, conducting himself to all intents and purposes as being at home. After that, undoubtedly, he passed a considerable portion of the remaining years of his life abroad. I think he first went abroad for a short time, and then returned again, and was in London up to 1833. And he then endeavoured, as my noble and learned friend has pointed out, to establish a newspaper in London, another indication of this being his place of residence. That did not answer, and from that year, 1833 or 1834, he was principally in Paris, where he died in January, 1841; principally in Paris, but continually coming to London. And I think the circumstance which has been pointed out by my noble and learned friend proves to demonstration that he never abandoned the intention of coming back to this country. He was a person above 80 years of age, and when one sees a man of that age providing for what shall come after a lease of three or six years, one cannot help feeling that the great probability is that he would be in his grave before that time has expired. But that was not this gentleman's view of the case, because he left his library here in the custody of his solicitor, Mr. Braikenridge, to

he taken care of till he returned; and in the most marked manner, in the year 1839, Mr. Allen, the bookseller, says, "He deposited with me a handsome ornamental clock and some pictures, in order that I might keep the same for the said testator during his absence, and until his return to London." How can you doubt that he looked to London as the place to which, as it were, he belonged?

[*159] *That being so, I might leave that part of the case; but I think it is not inexpedient on questions of this sort to say, that I think that all Courts ought to look with the greatest suspicion and jealousy at any of these questions as to change of domicile into a foreign country. You may much more easily suppose, that a person having originally been living in Scotland, a Scotchman, means permanently to quit it and come to England, or *vice versa*, than that he is quitting the United Kingdom, in order to make his permanent home, where he must for ever be a foreigner, and in a country where there must always be those difficulties which arise from the complication that exists, and the conflict between the duties that you owe to one country and the duties which you owe to the other. Circumstances may be so strong as to lead irresistibly to the inference that a person does mean *quatenus in illo exuere patriam*. But that is not a presumption at which we ought easily to arrive, more especially in modern times, when the facilities for travelling, and the various inducements for pleasure, for curiosity, or for economy, so frequently lead persons to make temporary residences out of their native country. It appears to me, therefore, preposterous to suppose that this gentleman did not look to return to this country.

Upon the subject of the domicile, my noble and learned friend has alluded to one definition which he said came from the Digest. It is also to be found in the Codes (Bk. 10, tit. 39, s. 7) and was a principle of Roman law. There have been many others, but I never saw any of them that appeared to me to assist us at all in arriving at a conclusion. In fact, none of them is, properly speaking, a definition. They are all illustrations in which those who have made them have sought to rival one another

[*160] *by endeavouring, as far as they can, by some epigrammatic neatness or elegance of expression, to gloss over the fact that, after all, they are endeavouring to explain something *clarum per obscurum*. By domicile we mean home, the permanent

home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it. I think the best I have ever heard is one which describes the home as the place (I believe there is one definition in which the *lares* are alluded to), the place “unde non sit discessurus si nihil avocet; unde cum profectus est, peregrinari videtur.” I think that is the best *illustration*, and I use that word rather than *definition*, to describe what I mean. It is perfectly clear that in this case it was competent to those who questioned this will to go into this matter, and to ask where he was domiciled, with a view to see how the property was to be distributed. But having done so, they have failed to show that he was domiciled anywhere else than in this country where, therefore, the property would have to be administered.

[The learned Lord concurred with the LORD CHANCELLOR upon the other two points.]

Lord WENSLEYDALE:—

[163]

My Lords, in this case I agree entirely with my noble and learned friends who have preceded me, and I really wish to offer very little in addition to what they have said. The main and principal question in this case is one of fact, and it has been very properly determined by the MASTER OF THE ROLLS upon the facts in evidence, that the deceased at the time of his death was domiciled in England. It is perfectly clear that he had lost his Scotch domicile and acquired an English one; and therefore the only remaining question was, whether, after having acquired an English domicile, he lost it by acquiring a French domicile. It is perfectly clear to me, that it is as distinctly proved as it can be, that when the testator began to reside at Paris, in the year 1837, he did so without the intention of making that city his permanent place of residence. The very terms in which he took the lease for three, six, or nine years, with the option of quitting at any time upon giving six months' notice, or of quitting it before, the apartments being let jointly by the lessee or lessor, shows that he had at that time no intention of fixing his permanent residence there. And there is other evidence, concluding with that of Mr. Lawson, who made his will, showing distinctly that he never went *to France with the inten- [*164] tion of permanently residing there.

I think it is quite unnecessary to enter into the question of

domicil, though I do not quite agree in the difficulty presented by my noble and learned friend who last spoke as to the definition of "domicil." There are several definitions of domicil, which appear to me pretty nearly to approach correctness. One very good definition is this: Habitation in a place with the intention of remaining there for ever, unless some circumstance should occur to alter his intention; I also take the definition from the Code, which is epigrammatically stated, and which I think will be found perfectly correct, that domicil is "in eo loco singulos habere domicilium non ambigitur, ubi quis larem rerumque ac fortunarum suarum summam constituit; unde rursus non sit discessurus si nihil avocet; unde cum profectus est, peregrinari videtur, quod si rediit, peregrinari jam destitit." I think that definition, if examined in all its parts, will be found to be tolerably correct, and that if well applied in this case, it will lead to a proper conclusion as to where the testator's domicil was at the time of his death. I perfectly agree with my noble and learned friend that in these times of visiting abroad, transferring oneself even for years abroad, you must look very narrowly into the nature of the residence abroad before you deprive an Englishman living abroad of his English domicil. In this case, I apprehend it to be perfectly clear, and the evidence alluded to leaves no doubt upon my mind that he went over to Paris for a temporary purpose; that he never meant to reside there permanently; that his domicil, his establishment, his principal residence, was meant to be in this country; and he never abandoned it. Therefore, I think that conclusion to which the MASTER OF THE ROLLS came, with respect to his domicil, was perfectly right.

[*165] * Then it becomes quite unnecessary to discuss the proposition as to the effect of the probate of the will in the Court of Canterbury. I do not know whether I should not agree with my noble and learned friend opposite, with a little explanation I have to give upon that subject, though I do not entirely agree with the proposition as laid down by him. I take it, that probate of a will in common form is conclusive evidence of the title of the executors to all personal property of which the testator was capable of disposing; it is also conclusive evidence that it was executed in due form according to the law of the country where he was domiciled at the time of the death, because it is beyond all question that the principle of *mobilia sequuntur per*

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sonam, is completely and entirely established. I take it to be a perfectly clearly established proposition at this day, confirmed by the case of *Stanley v. Bernard*, 3 Hagg. Ecc. Rep. 373, that the succession must be regulated according to the law of that country where he was domiciled at the time of his death, and that to make a valid will it must be executed according to the forms of the law of that country. Therefore a probate given in Canterbury, until revoked, must be considered as proof of the will being the will of a fully capable testator, and that it was executed according to the forms of the country in which he was domiciled at the time of his death. That I apprehend to be perfectly clear. If the will is proved in solemn form, as this was, the probate is incapable of being revoked, and the law of the domicile must be taken to be the law regulating the succession. At the same time, supposing it should turn out that in some particular country (which is, indeed the case in France under certain circumstances, and in Scotland) that the testator had not the power of disposing of the whole of *his personal property, then I [*166] agree with my noble and learned friend, that this instrument will only convey such property as, by the law of the country, he was entitled to dispose of by will. But it is conclusive evidence for that purpose. If it could be shown that there was a part that belonged to the widow and children by the law of that country where he was domiciled, the will would have no effect upon that part. It would be a nice question, what would be the effect of the probate if he died domiciled in a country where there was no power to make a will at all. My impression is still, that, until the probate was revoked in solemn form, it would still pass, as far as England was concerned, all the property to which the English law applied, and that the objection that he could not make any will at all ought to be set up in opposition to the will in the Ecclesiastical Court; and that it could not be set up in any way afterwards. I apprehend that my noble and learned friend will hardly dispute the qualification which I have added to the proposition which he has stated.

[Upon the other two questions the learned Lords concurred.]

The Orders and Decree appealed from were affirmed.

Lords' Journals, July 16, 1858.

ENGLISH NOTES.

In *Haldane v. Eckford* (1869), L. R., 8 Eq. 631, a residence taken up by a retired Indian civilian in the Island of Jersey, of a temporary character at the commencement, but in fact continued for twenty-five years until the death of the testator, was held sufficient evidence of his having constituted his domicile there.

In *Douglas v. Douglas* (1871), L. R., 12 Eq. 617, where the domicile of the testator was in question, the facts were as follows: The testator, William Douglas, was Scotch by domicile of origin. From the age of thirteen or fourteen until the death of his father in 1835, when the testator was thirty-two years old, he lived with his father and mother at Brighton in Forfarshire, where his father had possessed an estate. The estate had been sold in lots, but the mansion-house, and home farm had been retained. The testator after his father's death continued to live with his mother at Brighton. Subsequently his mother purchased a house at Broughty-Ferry which she used as a winter residence, using the house at Brighton as a summer residence. The testator resided with her until her death in 1857. After this he made some visits to England; and, in 1860, formed a connection with Miss R., with whom he lived in and near London. He returned occasionally to Scotland, put the house at Brighton in order, and arranged for the management of the farm by a factor. In 1863 he let the house at Brighton to a tenant for two years, reserving himself two rooms in which he stored his furniture. From this time until his death he had no establishment in Scotland. The lease was subsequently extended for a further period of two years and again for a period of three years. On the 13th August, 1863, the testator married Miss R. There was a son born previously and two children subsequently. In September, 1867, the testator took a lease of a house at Streatham for $5\frac{3}{4}$ years, and he died at that house on 16 February, 1869. These were the principal facts, with many other details bearing more or less on the intention. WICKENS, V. C., after an elaborate review of the evidence, sums up its legal effect (L. R., 12 Eq. 648) as follows: "The true conclusion from the facts seems to be, that the testator remained from 1863 to his death in a state of mind which might have resulted in his determining to settle in England permanently, but which never did so result; that if he had lived a few years longer, and had found by experiment that Mrs. Douglas and his children would be welcomed or tolerated in society at Brighton, he would have transferred himself there; that if this proved unfavourable, he would have sought another home in England or Scotland, as might happen to be convenient; and that, in fact, he remained to the end of his life un-

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decided on the point which is now in question. If so, the *onus* which lies on those who assert a change of domicile has not been discharged; and, without denying that the case is a peculiar and difficult one, I think, after anxiously weighing all the evidence, of which, of course, I have noticed part only, that the domicile of William Douglas, the testator, was Scotch from his birth to his death."

Where the question arises as to the domicile of a person at a period in his lifetime, the Court may pay regard to the oral evidence upon oath of the person himself to explain the intention of a residence as to which the bare facts taken by themselves would be equivocal. *Wilson v. Wilson* (1872), L. R., 2 P. & D. 446, 41 L. J. P. & M. 74.

Mere length of residence in one place, where there is no contrary evidence of intention, is sufficient to raise the presumption of intention to make a home there. In *King v. Foxwell* (1876), 3 Ch. D. 521, 45 L. J. Ch. 693, 24 W. R. 629. K., an Englishman, emigrated to the United States in 1851, and for fifteen years carried on the trade of a shoemaker at Syracuse in the State of New York. He was joined at Syracuse by his wife who died there. In 1854 he made a declaration of citizenship of the United States. In 1866 he married at Syracuse a second wife; and in the following year sailed with his wife to England. Differences having arisen, the wife returned to America, and K. remained in England, where, however, he did not acquire a settled residence. The MASTER OF THE ROLLS held that by the fifteen years residence at Syracuse, K. acquired a domicile of choice in the United States; but that, having abandoned that domicile, his English domicile of origin had reverted.

The case of *Platt v. Attorney General of New South Wales* (1878), 3 App. Cas. 325, 47 L. J. P. C. 26, 38 L. T. 74, 26 W. R. 516, when stripped of immaterial details, appears a very simple one. A person in New South Wales who had amassed a large fortune as a sheep farmer at various stations, purchased a lease of ninety years of a plot of land, on which he built a house at an expense of £16,000. On the 1st of October, 1864, he commenced to occupy the house with his wife and family and a large establishment, and they continued to reside there until his death on 16th December, 1866. It was held that he had established his domicile there.

In *Doucet v. Geoghegan* (C. A. 1878), 9 Ch. D. 441, 26 W. R. 825, the question was whether the succession to personalty was to be regulated by English or French law. The testator was originally a Frenchman, but had lived twenty-seven years in England, during which time he was engaged first as an assistant and then as a partner in a hosiery business. He was twice married in England, and did not on either occasion conform to the formalities required by French law for the

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legalization of marriages of Frenchmen in a foreign country. In the year 1869 the testator and his partner established a branch business in Paris. After his second marriage in 1856, the testator and his wife lived over the business premises in Regent Street; they afterwards removed to lodgings in Bentinck Street, where they resided between eleven and twelve years, and then the testator took a lease of a house in Albion Road, St. John's Wood, in which he lived until his death in 1874. Evidence was given by the plaintiff, who was the widow in support of the French domicile as follows: That the testator always and continuously expressed an intention of returning to live in France when he had made sufficient money to do so; that he refused to purchase a house or to take a longer lease than three years, because it would interfere with his returning to France; that he always desired to improve the branch business in Paris, which would enable him to live there and to establish his son in that business; that, after being taken ill, he was still more anxious to return to France, because he thought that his native air would improve his health. That he went to Paris two or three times a year, sometimes with his wife, and remained there two, three, and four weeks at a time; that he refused to be naturalized in England, and often spoke of the advantage he derived in being a Frenchman, as it exempted him from serving on juries. That on being urged to make a will he had said it was unnecessary, since the French law provided for the distribution of his property. (This was some time previous to the making of the will which was now disputed on the ground of the operation of French law.) Other witnesses deposed to the fact that the testator had frequently in the strongest terms expressed his intention of returning to France and permanently settling there, when he had made sufficient money to enable him to do so. The evidence on the other side was to the effect that, although in the first years of his residence in England he had a vague idea of returning to France, he never referred to this in later years, but on the contrary, refused to accept the proposal of one of his partners that he should remain half the year in Paris for the sake of improving the Paris business, because he said that since his father and mother's death he had no interest in living in France. It was held by the Court of Appeal, affirming the judgment of MALINS, V. C., that the evidence showed the testator's domicile to be English.

The MASTER OF THE ROLLS cited from the judgment of Dr. LUSHINGTON in *Hodges v. Beauchesne*, 12 Moo. P. C. at p. 329: — "Length of residence, according to its time and circumstances, raises the presumption of intention to acquire domicile. The residence may be such, so long and so continuous, as to raise a presumption nearly, if not quite, amounting to a *presumptio juris et de jure*; a presumption not to be

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rebutted by declarations of intention, or otherwise than by actual removal." And upon the case before him (*Doucet v. Geoghegan*) he concluded his judgment (9 Ch. D. 456) as follows: — "The contention here is, not that the declarations can be read to show a change back to his original domicile, but to prove that he never intended to acquire a domicile in England. But they are much too indefinite for that purpose. A declaration that a man means to return when he has acquired a fortune is not sufficient to outweigh actions which show an intention of permanent residence. In all the cases a difficulty arises as to the meaning of the word 'domicil'; but it evidently implies the intention to make the place one's home, and a home is itself suggestive of permanency. It is impossible to lay down an absolute definition of domicile, but in the present case there is every element that makes a home. The testator had no other home or place of residence; he showed by his actions no intention to change his residence. It is true that he only took his house for three or four years, but that is not sufficient to show an intention to change his residence. On the whole, it appears to me that there is nothing to outweigh the natural result of his acts, and that looking at his acts fairly, as a jury ought to do, the Court can come to no other conclusion than that his domicile was English. The appeal must therefore be dismissed with costs."

The case of *In re Patience, Patience v. Main* (1885), 29 Ch. D. 976, 54 L. J. Ch. 897, 52 L. T. 687, 33 W. R. 501, furnishes perhaps an extreme case where the unsettled character of the residence in a country has precluded the inference of intention to make a home there, notwithstanding residence in the same country for a lengthened period. The intestate was born in 1792 of parents in a humble position of life, at A. in the county of Ross in Scotland. In the year 1810 he obtained a commission in the army and immediately proceeded with his regiment on foreign service and served in various parts of the world from that time until 1860, when he sold his commission and retired from the army. From 1860 until his death he lived in lodgings, hotels, and boarding-houses in London, Margate, Ramsgate, Folkstone, Hastings, Harrogate, and other places, in England, and died intestate and a bachelor at a private hotel in London in 1882. From the time of his obtaining his commission in 1810, he never revisited Scotland, and for the last 22 years of life he was never out of England. He was a reticent man, and there was practically no evidence of intention except what may be inferred from the above facts. CHITTY, J., held that an English domicile was not established. After stating the facts and reviewing the cases he said (29 Ch. D. 984): — "It appears to me, therefore, that I must take into consideration the nature and character of the residence, and it appears that the intestate in this case was moving about Eng-

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land, and I think his shifting about from place to place shows a fluctuating and unsettled mind; and that the fact of residence, although for 22 years, standing alone without any other circumstances to show the intention, is insufficient to warrant me in coming to the conclusion that he had intended to make England his home."

In re Grove, Faucher v. Solicitor to the Treasury (C. A. 1888) 40 Ch. D. 216, 58 L. J. Ch. 57, 59 L. T. 587, 37 W. R. 1, was a case of somewhat complicated facts; and, as to the inference, there was some difference of opinion among the Judges. But the case may be taken as establishing the point that where the question is whether a domicile of choice at a particular period is established, acts, events, and declarations subsequent to the time in question are admissible in evidence as to the intention at that time; and in the opinion, at all events, of the majority of the Court the inference of intention from a residence of ten years up to the period in question, is much strengthened by continuance of the residence for a lengthened period afterwards.

With the case of *In re Patience, Patience v. Main* (*supra*), may be contrasted the decision of the same Judge, confirmed by the Court of Appeal in *Re Craignish, Craignish v. Hewitt* (C. A. 1892) 1892, 3 Ch. 180, 67 L. T. 689. The case had the peculiarity, which also occurred in *Bell v. Kennedy* (No. 4, p. 764, *post*), L. R. 1 H. L. Sc. 307, that the question was, not the domicile at the time of the death, but at the death of the wife, when the husband claimed a share in the succession to the wife's separate property, notwithstanding her will, according to Scotch law. The plaintiff accordingly gave his evidence as to his own domicile, which he contended was Scotch. It appeared that the plaintiff's domicile of origin was Scotch; that he led a roving life up to the time of his marriage in 1883, when he was in his 47th year. That after the marriage he went with his wife on a trip to Nice, and from Nice returned to London, where they stayed at Fisher's Hotel, Clifford Street. His wife presented him with a yacht, which was his only property, and was kept at Cowes. In the years 1883, 1884, and 1885 the plaintiff and his wife used the yacht for trips to the Mediterranean, &c. Whatever expeditions they made, they always came back to London, where they lived in various hotels and furnished rooms. On the 4th of January, 1886, the plaintiff signed an agreement for taking No. 25 Albert Gate, on a tenancy commencing the 15th of that month for a year certain with an option to the plaintiff to continue for another year, and if not required by the landlord, for a further term. He entered into possession accordingly, and resided there with his wife until their separation, which occurred in June or July following. The house was taken partly furnished. The wife had furniture in a repository, and some of this was removed to the house. After the separation the house was given

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up. The plaintiff continued to reside chiefly in London. He was a member of several clubs there, and had lodgings or furnished apartments in Suffolk Street, Bedford Gardens, Kensington, in Vauxhall Bridge Road, and in Cheniston Gardens, where he was when his wife died. He had a studio in Cheniston Gardens. He made a short expedition to Cairo, and he went round Scotland in the Norham Castle, accompanying the ocean yacht race of 1887 as one of the Thames Yacht Club Committee. This was the only visit (if it was a visit) to Scotland after the separation.

The legal effect of the evidence is summed up by CHITTY, J. (1892, 3 Ch. 191, 192), as follows: — “In the result, and on the assumption that the plaintiff’s domicile of origin was Scotch, I find that the plaintiff acquired by choice a domicile in England from the time when he went to reside with his wife in the house at Albert Gate, and that the domicile thus acquired was not afterwards abandoned, but continued to the death of his wife. The evidence of the fact of residence here is amply sufficient. The true inference to be drawn from the evidence of the circumstances surrounding and accompanying the fact of the residence here, when taken in connection with the plaintiff’s own letters and the other facts of the case viewed as a whole, appears to me to be that the plaintiff formed the intention of residing here indefinitely. There was the *animus revertendi* and *manendi*. According to Story’s definition, that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom: Story’s Conflict of Laws, sect. 43. There was no present intention on the plaintiff’s part to remove from London. London, which was at first merely his headquarters, afterwards became his home; he treated it as his home, and called it his home; more particularly he considered the house at Albert Gate, where he lived with his wife, as his home. A man may be in fact homeless, but he cannot in law be without a domicile. Subject to this distinction the term ‘home,’ in its ordinary popular sense, is practically identical with the legal idea of domicile: Dicey on Domicil, pages 42–55. Living in lodgings and changing the lodgings from time to time are circumstances to be taken into consideration on a question of domicile; they are not inconsistent with domicile. There are many foreigners resident and domiciled in this country who pass their lives in lodgings only; a man may be domiciled in a country without having a fixed habitation in some particular spot in that country. The plaintiff’s lodgings or apartments were all within the area of London. If (as I think was the case) the plaintiff’s domicile was English in January, 1886, there is no sufficient evidence to show subsequent abandonment of that domicile. The subsequent breaking up of the house at Albert Gate is attributed by the plaintiff to his wife; even if it were his own act, it would not of itself

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constitute an abandonment of a home or domicile in England. For the period of two and a half years which elapsed between the separation and his wife's death the plaintiff's principal place of residence was in London; he quitted London only for the temporary purpose of his short trips abroad. The plaintiff's counsel relied on the decision in *In re Patience*, 29 Ch. D. 976. On a question of fact a decision in a previous case affords little or no assistance. In that case I thought there was not sufficient evidence of intention. In this case I think there is."

The Court of Appeal concurred in this decision.

The defendant S. was born in 1868, in Ireland, where his father was temporarily located. In 1873 he returned with his father to England. In 1883 he went to Cannes to live with his uncle there. In 1887 he came to Birmingham for the purpose of studying pharmacy. In the same year his father acquired an Irish domicile, and S. paid occasional visits at his father's home there. In 1890 he returned to his uncle at Cannes. In 1892 he married a lady who had been born in Jersey and was the widow of a Frenchman, the ceremony being performed at Nice. His wife left him shortly afterwards, and the action arose out of disputes between them. By deed dated 20th September, 1892, made under a power of attorney executed by S. in Ireland, he entered into a partnership with his uncle and another for a term of ten years in a business to be carried on at Cannes. He paid a considerable premium upon entering into this business by means of money obtained from his wife, and for some time previously to the issue of the writ in the action regularly attended to the business in Cannes. He had, on the 10th of October, 1892, registered himself with the Mayor of Cannes as having declared his wish "*établir (ou) avoir établi sa résidence à Cannes.*" The wife instituted an action in the Irish Court and applied for leave to serve the writ out of the jurisdiction upon S., on the ground that he was domiciled in Ireland. It was held by PORRER (M. R. for Ireland), upon the facts, particularly the fact of the defendant's paying the premium and regularly attending to the business in which he had engaged himself for ten years, that he was domiciled at Cannes, and not in Ireland. *Sparway v. Sparway* (22 July, 1893), 1894, 1 Ir. Ch. D. 385.

AMERICAN NOTES.

The principal case is repeatedly cited in *Jacobs on Domicil*, where the subject is discussed exhaustively and learnedly.

In *Fitzgerald v. Arel*, 63 Iowa, 104, the Court said: "Residence and domicile are not necessarily the same. 2 Kent Com. 431, note; *Love v. Cherry*, 21 Iowa, 201; *Cohen v. Daniels*, 25 id. 90. In the latter case, BECK, J., said, 'The distinction between the import of the terms "residence" and "domicil" is obvious. The first is used to indicate the place of dwelling, whether perma-

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ment or temporary; the second to denote a fixed, permanent residence, to which, when absent, one has the intention of returning." See also *Price v. Price*, 156 Pennsylvania State, 617; *Crawford v. Wilson*, 4 Barbour (New York Supreme Ct.), 522; *Shelton v. Tiffin*, 6 Howard (U. S. Supreme Ct.), 185; *Pearce v. State*, 1 Sneed (Tennessee), 63; 60 Am. Dec. 135. In *Long v. Ryan*, 30 Grattan (Virginia), 718, it is said: "There is a wide distinction between domicile and residence recognized by the most approved authorities. 'Domicil' is defined to be a residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. To constitute domicile two things must concur: first, residence; secondly, the intention to remain there. Domicil therefore means more than residence. A man may be a resident of a particular locality without having his domicile there. He can have but one domicile at one and the same time, at least for the same purpose, although he may have several residences. According to the most approved writers and lexicographers, residence is defined to be the place of abode, a dwelling, a habitation, the act of abiding in a place for some continuance of time. To reside in a place is to abide, to sojourn, to dwell there permanently or for a length of time. It is to have a permanent abode for the time being as contradistinguished from a mere temporary locality of existence." "Residence" commonly imports something less fixed and stable than, and to that extent different from, 'domicil.'" Jacobs on Domicil, p. 121. "In a strict legal sense, that is properly the domicile of a person where he has his true, fixed, permanent house and principal establishment, and to which, whenever he is absent, he has the intention of returning." Story on Conflict of Laws, sect. 41. In the leading case of *Guier v. O'Daniel*, 1 Binney (Penn.), 349, n. "domicil" is defined to be "a residence at a particular place, accompanied with positive or presumptive proof of continuing in it an unlimited time." This has been much quoted, and with general approbation. In *Putnam v. Johnson*, 10 Massachusetts, 488, the Court said: "In this new and enterprising country it is doubtful whether one half of the young men, at the time of their emancipation, fix themselves in any town with an intention of *always staying there*. They settle in a place by way of experiment, to see whether it will suit their views of business and advancement in life, and with an intention of removing to some more advantageous position if they should be disappointed. Nevertheless they have their home in their chosen abode while they remain. Probably the meaning of Vattel is that the habitation fixed in any place, without any present intention of removing therefrom, is the domicile. At least this definition is better suited to the circumstances of this country." (This was a question of municipal and not of national domicile.) This is followed in *Gilman v. Gilman*, 52 Maine, 165; 83 Am. Dec. 502. "No one word is more nearly synonymous with the word 'domicil' than the word 'home.'" *White v. Brown*, 1 Wallace, Junior (U. S. Circ. Ct.), 217. So in *Mitchell v. United States*, 21 Wallace (U. S. Supreme Ct.), 350; *Exeter v. Brighton*, 15 Maine, 58; *Shaw v. Shaw*, 98 Massachusetts, 158; *State v. Aldrich*, 11 Rhode Island, 171; *Chaine v. Wilson*, 1 Bosworth (New York Super. Ct.), 673; *Pry's Election Case*, 71 Pennsylvania State, 302; *Roberts v. Cannon*, 4 Devereux & Battle (Nor. Car.

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Law), 256; *Smith v. Croom*, 7 Florida, 81; *Venable v. Paulling*, 19 Minnesota, 488. Some cases however require some qualifying adjective expressive of permanency. *Dupuy v. Wurtz*, 53 New York, 556; *Horne v. Horne*, 9 Iredell (Nor. Car.), 99; *Hayes v. Hayes*, 74 Illinois, 312; *Hairston v. Hairston*, 27 Mississippi, 701; 61 Am. Dec. 530. See Notes, 13 Lawyer's Rep. Annotated; 161.

 No. 2. — DOLPHIN *v.* ROBINS.

(H. L. 1859.)

RULE.

THE domicile of a married woman is during coverture the same as, and follows, the domicile of her husband.

Dolphin v. Robins.

7 H. L. Cas. 390-423 (s. c. 29 L. J. P. & M. 11; 5 Jur. n. s. 1271).

[391] A. and B. were married in England in 1822; they lived together till 1839, when they separated. In February 1854 the husband went to Scotland, and resided there, with some very short intervals, till July 1854. In June 1854, his wife, who had followed him to Scotland, sued out, in the Scotch Courts, a process for dissolution of marriage, on account of adultery committed by him in Scotland. In July a decree for divorce *à vinculo* was pronounced. In September she married a Frenchman (according to the forms required by Scotch and by French law), and went with him to his domicile in France. While in England she had executed an English will, in pursuance of a power reserved to her, and in accordance with the terms of that power. After having resided nearly two years in France, she executed, in June, 1856, a holograph will (valid according to the laws of that country) revoking all previous wills: —

Held (sustaining the judgment of the Court of Probate) that there had not been any change of domicile by the husband A.; that the domicile of B. the wife, was that of her husband; that the Scotch decree of divorce had no effect; that she continued to be a married woman and a domiciled English woman; and that consequently her will of 1851 was properly admitted to probate, and the revoking paper of June, 1856, was a nullity.

This was an appeal against an order made by Sir C. CRESSWELL, the Judge of the Probate Court, on the 5th of March, 1858, by which he rejected a responsive allegation tendered by the present appellant, in a suit which the respondents had instituted to obtain probate of the will of Mary Ann Dolphin, otherwise Marie Eustelle de Pontés, deceased.

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On the 15th of July, 1822, in contemplation of a marriage between Mary Ann Payne and Vernon Dolphin, a deed was executed, by which Dolphin covenanted to settle certain hereditaments, therein described, to the uses of the marriage. This marriage was celebrated on the next day at St. George's, Hanover Square.

* On the 1st of April, 1823, indentures of lease and re- [* 392] lease were executed in pursuance of this covenant, by which certain manors were settled in trust for securing to Mary Ann Dolphin £200 a year for her separate use during the joint lives of the appellant and herself, with remainder to secure her £700 a year if she should survive the appellant, and, after certain specific limitations, with remainder to the appellant, his heirs, &c. One child was born of this marriage, but it died shortly after its birth. In 1839 differences arose, and the two parties agreed to separate. By a deed of trust executed on the 15th of November, 1839, in pursuance of a family arrangement, certain estates were settled on trusts therein described, after satisfying which the trustees were to pay the surplus to Mary Ann Dolphin for life for her separate use, or to such persons as she should, notwithstanding coverture, appoint; and in case of her dying during the life of the appellant, then on trust for such purposes as, notwithstanding coverture, she should by any deed, with or without the power of revocation, duly executed, and attested in the presence of two or more credible witnesses or by her last will, direct; and in default of such direction, in trust for the appellant, his executors, &c. A similar power was given to her with regard to other estates not previously mentioned.

On the 11th of April, 1854, Mrs. Dolphin (then residing in England), in exercise of the power reserved to her under the deed of 1839, made a will, executed according to the forms required by that deed, by which she appointed Robins and Paxton her executors, with directions to sell all the estates over which she had power to direct a sale, and (after setting apart £12,000 for the purposes therein mentioned, some of which were trusts for her husband's benefit) to stand possessed of the monies thereby obtained upon various trusts therein set forth: "And as to the * rest, residue, and remainder of the monies to [* 393] arise and be received by the means aforesaid, I give and bequeath the same unto my true and best friend, General Amedée

Davéziés de Pontés, commandant at La Rochelle, in France, his executors, &c., whose wrongs I in this my will declare were not wilfully caused by me, and that both he and myself are the victims of cruel deception and injury." By a codicil executed on the same day she revoked the direction contained in the will as to the £12,000, "and all the trusts declared by the will of the said sum," and all the gifts thereby made in favour of her husband.

These papers were the will and codicil tendered for probate by the executors.

The appellant opposed the reception of these papers, and tendered a responsive allegation, which was afterwards amended, and in its amended state set forth, "that in the month of February, 1854, the said Vernon Dolphin, the then husband of the party deceased in this cause, left England, and went to Scotland; that on the 23rd day of February, 1854, he arrived at Edinburgh; and from such time until the 25th of the said month he resided at the Waterloo Hotel in Edinburgh aforesaid, when he left the said hotel, and from such time until the 3rd day of April following he resided at a cottage called South Cottage, which he had hired as a residence, at Wardie, near Edinburgh; and that on the said 3rd day of April he returned to the said Waterloo Hotel, where he resided until the 9th of the said month, when he left the said hotel, and went to England for a few days, and returned to Scotland, and resided again at Edinburgh and Stirling, in Scotland, until the 6th day of June following, when he again returned to and took up his abode at the said hotel, and there remained till the 19th of the

said month; that the said Vernon Dolphin had by such [* 394] residence, and in *intention as well as in fact, become a domiciled Scotchman. That the party deceased in this cause having ascertained that the said Vernon Dolphin was living in adultery during the said time in Scotland, on the 17th of the said month of June a summons was personally served upon the said Vernon Dolphin, at her instance, in an action of divorce before the Lords of the Court of Council and Session in Scotland, against her then husband, the said Vernon Dolphin, on the ground of adultery. That on the 19th day of the said month of June the said Vernon Dolphin again went to England, but returned afterwards to Scotland, and was there resident for some days in the month of July, 1854. That on the 20th day of the said month of July the said

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Lords of the Court of Council and Session in Scotland by their decree, dated the 20th day of July, 1854, found the said Vernon Dolphin guilty of adultery, and therefore divorced and separated him from the said Mary Ann Payne or Dolphin, her society, fellowship, and company, in all time to come, and declared that he had forfeited all the rights and privileges of a lawful husband, and that the said Mary Ann Payne or Dolphin was entitled to live single, or marry any free man, as if she had never been married to the said Vernon Dolphin, or as if he were naturally dead. And the party proponent expressly alleges and propounds, that by such decree the said Mary Ann Payne or Dolphin became and was, from and after the said 20th day of July, 1854, absolutely divorced from the bond of matrimony with the said Vernon Dolphin, and free to marry any other man.

On the 8th October, 1854 (all the forms of the Scotch and of the French laws having been complied with) she was married to General de Pontés, a Frenchman, and immediately afterwards went with him to reside in France. In 1855 she became a member of the Roman Catholic Church, and took the names of Marie Eustelle Davéziés * de Pontés. On the 3d of April, 1856, [* 395] she made a will, valid according to the French law, by which she appointed General de Pontés her “universal legatee,” and General Korte, sole executor. She was shortly afterwards placed by De Pontés in the convent of Les Dames Augustine. On the 23d June, 1856, she made a holograph will, valid by French law, in these words, “I revoke all previous wills made by me up to this date, 23rd June, 1856,” and enclosed this revocation in an envelope, on which was written the following memorandum, “Last will which I have made this day, 23d June, 1856,” and signed her recently adopted names in full to each paper. The papers she entrusted to an intimate female friend, and she died in September, 1856. These were the papers which the appellant proposed by his responsive allegation to bring before the Court, as the last will of the deceased, contending that by the Scotch divorce, and the subsequent marriage, and the residence in France, she had acquired a French domicil, and was entitled and of capacity to make a French will, and that this last will was valid by the laws of France.

The case was heard before Sir C. CRESSWELL, who, on the 5th March, 1858, made an order rejecting the responsive allegation.

The learned Judge (as the order was interlocutory) granted leave to appeal, and this appeal was then brought,

After hearing arguments from Sir H. Cairns (Solicitor-General) and D. Deane (Dr. Twiss was with them) for the appellant and Mr. R. Palmer and Mr. Bush for the respondents, the Lords took time for consideration.

On a subsequent day, —

Lord CRANWORTH, (after stating the facts set forth in the responsive allegation): —

[* 412] The very learned Judge of the Court of Probate rejected this allegation of the appellant, on the ground that it stated no case impeaching the validity of the will and codicil propounded by the respondents, and the appellant now complains of that rejection. The grounds on which the appellant relied were, that by the proceedings in Scotland, the marriage with the appellant was dissolved, so as to enable the deceased to contract a new marriage; that she did in fact contract a new marriage in 1854 with General des Pontés, a domiciled Frenchman, and became herself domiciled in France, and so continued from the time of her marriage till her death; and that while so domiciled, she made the will of 23d June, 1856, in the mode required by the laws of the country of her domicile, which, therefore, was a valid revocation of the will and codicil of April, 1854. The appellant farther contended, that even if the divorce was not valid, so as to enable the deceased to contract a second marriage, still it operated as a divorce *à mensâ et thoro*, and enabled her to select a domicile of her own, and that in fact she did select France as her domicile, where she lived and died.

The learned Judge of the Court below was of opinion that the English marriage was not dissolved by the Scotch divorce, and that so the deceased remained up to the time of her death the wife of the appellant, whose domicile was and had always been in England; that this domicile was her domicile, and that the will, or alleged will, of June, 1856, not having been executed in the mode required by our laws, had no effect on the will and codicil of 1854. He farther held, that the Scotch decree did not operate as a divorce *à mensâ et thoro*, and so made a decree rejecting the allegation.

The same points which had been pressed in the Court below was repeated here, and arguments were urged with [* 413] * great ability at your Lordships' bar in their support.

But they have failed to convince me, or, as I believe, any of your Lordships who heard the case. On the first question, that of the validity of the Scotch decree of divorce to dissolve the English marriage, the decision in *Lolley's Case*, Russ. & Ry. 237, is conclusive. It was indeed contended in the argument here, that *Lolley's Case* did not necessarily govern that now under consideration, for since that decision the principles applicable to this question have been materially changed by the statute 9 Geo. IV. c. 31. But this seems to me altogether a mistake. In *Lolley's Case* it appears that he, having been married in England, afterwards went to Scotland, and while he was there, not having become a domiciled Scotchman (for that must be assumed to have been the state of the facts), his wife obtained a Scotch decree for a divorce, on the ground of adultery committed by him in Scotland. After the decree was pronounced, he returned to England, and married a second wife at Liverpool. This was held by the unanimous opinion of the Judges to be bigamy, on the ground "that no sentence or act of any foreign country or state could dissolve an English marriage *a vinculo matrimonii*; that no divorce of an Ecclesiastical Court was within the exception in 1 James I. c. 11, s. 3, unless it was the divorce of a Court within the limits to which the 1st James I. extends." The exception in the statute 1 James I. was of "any person divorced by sentence in the Ecclesiastical Court." It was contended at the bar that the decision might have been different if the case had arisen since the 9th Geo. IV. c. 31, which repeals the statute 1 James I. c. 11, and by s. 22 again makes bigamy a felony, but with a proviso that the enactment shall not extend to any person who *at the time of the second [*414] marriage shall have been divorced from the bond of the first marriage. It was said that though the Scotch Court was not the Ecclesiastical Court contemplated by the statute 1 James I., and that so Lolley was not within the exception contained in that statute, yet that as he had been in fact divorced, he would not have been within the proviso of the statute 9 Geo. IV. c. 31. This, however, is evidently a mistake. He was not, and could not be divorced; for, according to the express opinion of the Judges, no foreign court can dissolve the bonds of an English marriage.

Lolley's Case has been frequently acted on. In the case of *Conway v. Beuzley*, 3 Hagg. Ecc. Rep. 636, Dr. LUSHINGTON, after much consideration, acted on it, treating it as settled law where there is

no "*bonâ fide* domicile," a real domicile, and not a domicile assumed merely for the purpose of giving jurisdiction. And I believe your Lordships are all of opinion that it must be taken now as clearly established, that the Scotch Court has no power to dissolve an English marriage, where, as in this case, the parties are not really domiciled in Scotland, but have only gone there for such a time as, according to the doctrine of the Scotch Courts, gives them jurisdiction in the matter. Whether they can dissolve the marriage, if there be a *bonâ fide* domicile, is a matter upon which I think your Lordships will not be inclined now to pronounce a decided opinion.

On the other point, decided in the Court below, I think there can be no doubt. If the Scotch divorce did not operate as a dissolution of the marriage, it clearly did not operate as a divorce *à mensû et thoro*. It was not intended so to operate, and it is by no means certain that the deceased would have desired to [*415] obtain such a decree. It *appears, therefore, to me, that on both the points raised in argument before him, the learned Judge below was clearly right.

But on the argument here a new point was started. It was contended that, without any dissolution of the marriage, or any divorce *à mensû et thoro*, the deceased was, by the acts of the husband appearing on the allegation, placed in a situation enabling her to choose a domicile for herself separate from that of her husband; and that, in fact, she did choose France as her domicile, and there lived and died; that when so domiciled, she made the will of the 23d June, 1856, valid according to the laws of the place of her domicile, which therefore ought to have been admitted to proof, or, at all events, that, as her domicile was at her death French, the English will and codicil ceased to be operative.

This point was urged with considerable ability and force; and as it was one which had not been put forward below, and therefore had not been considered by Sir CRESSWELL CRESSWELL, your Lordships desired to have a second argument at the bar confined to this single point. Accordingly your Lordships, a few days since, heard Sir Hugh Cairns for the appellant, and Mr. Roundell Palmer for the respondents, both of whom did full justice to the question argued. I have given my best consideration to the able arguments then addressed to us, and have come to the conclusion that there is nothing in this new view of the case which ought to induce your Lordships to disturb the decision of the Court below.

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On the part of the respondents, it was argued that, even if there had been a divorce *à mensâ et thoro*, the wife could not have acquired a domicile of her own; and in support of that argument, reliance was placed on the clear and undoubted doctrine of our law, that husband and wife *are to be treated as [*416] one person; that their union, whatever decree may have been made by the Ecclesiastical Court, is by the common law absolutely indissoluble; that the wife can neither sue nor be sued without her husband; that the husband is bound to maintain her, and to afford her a home; that, with reference to the poor-laws, her settlement is her husband's settlement; and, generally, that in the eye of the law they are so completely identified, that the notion of her acquiring a separate home could not for a moment be admitted.

I desire not to be taken to adopt this argument at once to the full extent to which it was pushed. If in this case the deceased had obtained in England a divorce *a mensâ et thoro*, and had then gone to France, and there established herself in a permanent home, living there till her death, as the wife of General des Pontés, I desire not to be understood as giving any opinion on the point, whether in such a case her domicile would or would not have been French. The question where a person is domiciled is a mere question of fact; where has he established his permanent home? In the case of a wife, the policy of the law interferes, and declares that her home is necessarily the home of her husband; at least it is so *primâ facie*. But where, by judicial sentence, the husband has lost the right to compel the wife to live with him, and the wife can no longer insist on his receiving her to partake of his bed and board, the argument which goes to assert that she cannot set up a home of her own, and so establish a domicile different from that of her husband, is not to my mind altogether satisfactory. The power to do so interferes with no marital right during the marriage, except that which he has lost by the divorce *à mensâ et thoro*. She must establish a home for herself, in point of fact; and the only question is, supposing that home to be one where the laws of succession to personal *property are different from [*417] those prevailing at the home of her husband, which law, in case of her death, is to prevail? Who, when the marriage is dissolved by death, is to succeed to her personal estate? those entitled by the law of the place where, in fact, she was established, or those where her husband was established? On this question it

is unnecessary, and it would be improper, to pronounce an opinion, for here there was no judicial sentence of divorce *à mensâ et thoro*, no decree enabling the wife to quit her husband's home and live separate from him. I have adverted to the point only for the purpose of pointing out, that the conclusion at which I have arrived in the case now under discussion would afford no precedent in the case of a wife judicially separated from her husband. For, whatever might have been the case if such a decree had been pronounced, I am clearly of opinion, that, without such a decree, it must be considered that the marital rights remain unimpaired.

It was, indeed, argued strongly, that here the facts show, that the husband never could have compelled his wife to return to him. The allegation of the appellant, it was contended, contains a distinct averment that the husband had committed adultery; and this would have afforded a valid defence to a suit for restitution of conjugal rights, and so would have enabled the wife to live permanently apart from her husband, which, it is alleged, he agreed she should be at liberty to do. But this is not by any means equivalent to a judicial sentence. It may be that where there has been a judicial proceeding, enabling the wife to live away from her husband, and she has, accordingly, selected a home of her own, that home shall, for purposes of succession, carry with it all the consequences of a home selected by a person not under the disability of coverture. But it does not at all follow that it can

[*418] be open to any one, after the death of the wife, to say, * not that she had judicially acquired the right to live separate from her husband, but that facts existed which would have enabled her to obtain a decree giving her that right, or preventing the husband from insisting on her return. It would be very dangerous to open the door to any such discussions; and, as was forcibly put in argument at the bar, if the principle were once admitted it could not stop at cases of adultery. For, if the husband, before the separation, had been guilty of cruelty towards the wife, that, no less than adultery, might have been pleaded in bar to a suit for restitution of conjugal rights. It is obvious, that to admit questions of this sort to remain unlitigated during the life of the wife, and to be brought into legal discussion after her death for the purpose only of regulating the succession to her personal estate, would be to the last degree inconvenient and improper. The observations of Lord ELDON and Lord REDESDALE in the case

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of *Tovey v. Lindsay*, 1 Dow, 138, 139, 140 (14 R. R. 19, 30, 34), evidently had reference only to the facts of the case then before the House, where the question was not as to what would be the wife's domicile as regarded succession to her personal estate, but as to the place where she was to be considered as resident for the purpose of being served with process.

I am clearly of opinion that, without going into questions as to whether the facts are or are not duly pleaded, they afford no ground of defence to the claim of the respondents, and that the respondents are entitled to insist on the will and codicil of April, 1854, as being the last will and codicil of the deceased.

I have already observed, that the decision in this case will be no precedent where there has been a decree for judicial separation; and, before quitting the subject, I should add, that there may be exceptional cases to * which, even without judicial [* 419] separation, the general rule would not apply, as for instance, where the husband has abjured the realm, has deserted his wife, and established himself permanently in a foreign country, or has committed felony and been transported. It may be, that in these and similar instances the nature of the case may be considered to give rise to necessary exceptions. I advert to them only to show, that the able argument of Sir Hugh Cairns has not been lost sight of. It is sufficient to say, that in the appeal now before the House no such case of exception is to be found.

Mr. Palmer, at the close of his argument, observed that whatever might become of the will and codicil of April, 1854, the French will of the 23d June, 1856, could not be admitted to probate for want of due attestation, not having been executed in the manner and with the formalities required by the power. I incline to think he is right in this suggestion. But whether that would be decisive as to the validity of the prior will and codicil, supposing the domicile of the deceased to have been French, might turn on nice questions which have not been argued in this case, as to how far the doctrine, that a will of personalty to be valid must be a will valid according to the law of the domicile of the deceased at his death, would apply to the case of a will of a married woman made under a power. Into this question it is unnecessary for us to travel.

I cannot conclude without saying that, although I am sorry for the delay which the second argument has occasioned to the

parties, I cannot regret the course your Lordships took in requiring it. The question was one of great importance; and, not having been raised in the Court below, it required a special consideration when brought for the first time under the notice of this House. I must add, that my noble and learned friends, Lord BROUGHAM,

Lord WENSLEYDALE, and Lord CHELMSFORD, before leaving [*420] town, *told me that they entirely concurred in the view of the subject which I have stated. Lord BROUGHAM had expressed some little doubt upon the matter; but he stated, that he did not think it necessary to remain in order to express that doubt, as his single opinion could not affect the decision.

I shall conclude by moving your Lordships to affirm the decree below, and to dismiss the appeal. But as the questions discussed have arisen from the conduct of the wife, no less than of the husband, and as the case was one of some nicety, and the appeal was presented under the express sanction of the learned Judge of the Court below, I think it should be dismissed without costs.

Lord KINGSDOWN: —

My Lords, my noble and learned friend has done me the favour to communicate to me the opinion which he proposed to express to the House, and I have had an opportunity of communicating with him my views upon it. And as I concur generally in the conclusion at which he has arrived, and for the reasons upon which that conclusion is founded, I think it will be most conducive to the administration of justice in your Lordships' House in a satisfactory manner, to content myself with expressing that assent instead of repeating the arguments, or going in detail into the facts to which he has already alluded.

One thing only I am anxious to guard against. If any expressions of my noble and learned friend have been supposed to lead to the conclusion that his impression was in favour of the power of the wife to acquire a foreign domicile after a judicial separation, it is an intimation of opinion in which at present I do not concur. I consider it to be a matter, whenever it shall arise, entirely open for the future determination of the House.

There is only one other matter which I will take the [*421] *liberty of pointing out to your Lordships, which is this

It was mentioned, I think, in the course of the argument, but it appears to show most distinctly that no question of law really can arise with respect to this divorce, that it was a mere

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collusion from the beginning to the end between the husband and the wife. My Lords, the will and codicils which are now propounded are of the most remarkable character. The will gives a legacy of £12,000 to the husband. The codicil, executed on the same day and attested by the same witnesses, one, I think, being the solicitor or law agent of the parties, revokes that legacy. Now at first sight one is very much perplexed to imagine what could be the purpose of that contrivance, a gift by will of £12,000, and a revocation of that gift on the very same day on which it is given. But, my Lords, on referring to the instructions for this will, and to the dates as they appear in these proceedings, the whole matter becomes perfectly clear. Mr. Dolphin went into Scotland in the month of February, 1854. He returned, as it appears, on the 9th of April, 1854, and at that time it is manifest there was a negotiation between the husband and wife for the purpose of procuring the Scotch divorce. The will is dated two days after this gentleman comes to England, and in the memorandum of instructions for that, although it is not very legibly or very intelligibly expressed, we find these words: "The sum of £12,000 to Vernon Dolphin, Esq., left as Mr. Robins thinks best" (I believe Mr. Robins was the solicitor) "to be forfeited, if by false or insufficient evidence to procure the present divorce in Scotland is established." The language is not very clear, but it is quite obvious what was intended. He was to have £12,000 provided he would establish in Scotland such a case as would enable her to obtain a divorce in that country. My Lords, on the 11th of April, accordingly, this document is executed, or rather, I should say, these * two documents. He goes back afterwards to Scot- [* 422] land, or at least is there in the month of June. On the 17th of June a summons for this action of divorce is served upon him for the purpose of being answered. He comes back to England, he returns to Scotland for a few days in the month of July, and on the 20th of July the sentence of divorce is pronounced. It is clear, therefore, my Lords, that it was mere mockery and collusion from beginning to end, and so this must be treated as a case in which the wife still remained under the marital control of her husband. And I entirely agree with my noble and learned friend that in the circumstances of this case there cannot be the smallest doubt that she was in no degree emancipated from the marital control, and that she could not acquire that foreign domicile by which

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alone effect could be given to the paper propounded in this allegation.

If I had regarded this case as capable of being proved at all, I should still have thought that it would have been impossible to prove it under the present allegation. It would have appeared to me that this lady had, by an act of her own volition, by her own spontaneous act, chosen and acquired a foreign domicile, and that that fact was quite inconsistent with the statement in this allegation, that she had acquired that domicile not by her own volition, but, (it might be) in spite of her own volition, by becoming the wife of a domiciled Frenchman. But, my Lords, as the only effect of giving leave to amend would be, that a case would be brought forward which it would be utterly impossible to sustain, I entirely concur in the conclusion which my noble and learned friend has proposed, that this appeal should be dismissed and, as he suggests, without costs.

The LORD CHANCELLOR (LORD CAMPBELL): —

My Lords, as I had not the advantage of hearing the whole [* 423] argument in this case, I refrain from giving any * opinion upon the general merits of it. But I did hear one question argued, which was a separate question; it was very ably argued on both sides; and I think it may be proper that I should say that upon that question I entirely concur in the opinion which has been expressed by my two noble and learned friends. The first marriage in 1822 remained in full force: there was no dissolution of that marriage, nor any judicial *séparation de corps*, as the French call it; there was no such separation as would even amount to a divorce *à mensâ et thoro*. I am quite clear therefore that this lady was not in a situation to acquire a new domicile separate from that of her husband. Upon the other question to which my noble and learned friend has referred, I abstain from giving any opinion. It is quite clear that the mere consent of the husband that she should live elsewhere, would confer no right upon her to acquire a foreign domicile.

Order or decree appealed from affirmed, and appeal dismissed without costs.

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ENGLISH NOTES.

The principal case was followed and the rule applied by the Judge Ordinary. Sir CRESSWELL CRESSWELL, in *Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574, where the law was laid down as follows (p. 584): "The domicile of the husband is the domicile of the wife; and even supposing him to have been guilty of such misconduct as would furnish her with a defence to a suit by him for restitution of conjugal rights, she could not on that ground acquire another domicile for herself, as was recently held by the House of Lords in *Dolphin v. Robins.*" The same rule was followed by Sir J. PHILLIMORE in *Le Sueur v. Le Sueur* (1876), 1 P. D. 139, 45 L. J. P. 73, 34 L. T. 511, 24 W. R. 616; and was again recognised by the President, Sir J. HANNEN in *Firebrace v. Firebrace* (1878), 4 P. D. 63, 47 L. J. P. 41, 39 L. T. 94, 26 W. R. 617; by the House of Lords in *Harrie v. Farnie* (1882), 8 App. Cas. 43, 52 L. J. P. D. & A. 33, 48 L. T. 273, 31 W. R. 433 (No. 1 of "Conflict of Laws," 5 R. C. 703); and by Mr. Justice BARNES in *Green v. Green* (31 Jan. 1893), 1893, P. 89, 62 L. J. P. 112, 68 L. T. 261, 41 W. R. 591. It is, lastly, inferentially recognised by the judgment of the Judicial Committee in *Le Mesurier v. Le Mesurier* (29 June, 1895), 1895, App. Cas. 517, where the rule that jurisdiction to pronounce a decree of divorce *a vinculo* depends on the domicile (see 5 R. C. 703) is confirmed on an exhaustive review of the cases.

AMERICAN NOTES.

This case is largely cited in Jacobs on Domicil, and it expresses the general doctrine of this country upon the point in question. The wife receives the domicile of the husband upon marriage, and it changes with his. See notes to *Harvey v. Farnie*, ante, vol. 5, p. 707; *Penna. v. Raveuel*, 21 Howard (U. S. Sup. Ct.), 103; *Greene v. Windham*, 13 Maine, 225; *Johnston v. Turner*, 29 Arkansas, 280; *Mason v. Homer*, 105 Massachusetts, 116; *Kashaw v. Kashaw*, 3 California, 312; *Ditson v. Ditson*, 4 Rhode Island, 87; *Bank v. Balcom*, 35 Connecticut, 351; *Hunt v. Hunt*, 72 New York, 217; 28 Am. Rep. 129; *Baldwin v. Flagg*, 43 New Jersey Law, 495; *Bishop v. Bishop*, 30 Pennsylvania State, 412; *Ensor v. Graff*, 43 Maryland, 291; *Colburn v. Holland*, 11 Richardson Eq. (So. Car.), 176; *Harkins v. Arnold*, 46 Georgia, 656; *Hanberry v. Hanberry*, 29 Alabama, 719; *Jenness v. Jenness*, 24 Indiana, 355; 87 Am. Dec. 335; *Babbitt v. Babbitt*, 69 Illinois, 277; *Beard v. Knox*, 5 California, 252; 63 Am. Dec. 125; *Sweeney v. Hutchins*, 13 Nebraska, 266; *Johnson v. Johnson*, 12 Bush (Kentucky), 485; *Williams v. Saunders*, 5 Coldwell (Tennessee), 60; *Russell v. Randolph*, 11 Texas, 460; so "universally held in all civilized countries," Jacobs on Domicil, p. 291. Even though she does not accompany him. *Burlen v. Shannon*, 115 Massachusetts, 438; 96 Am. Dec. 733; *Loker v. Gerald*, 157 Massachusetts, 42; 34 Am. St. Rep. 252; 16 Lawyer's Rep. Annotated, 497; *Johnston v. Turner*, supra; *Russell v. Randolph*, supra; *Hair-*

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ston v. Hairston, 27 Mississippi, 701; 61 Am. Dec. 530. And she cannot change it, even with the consent of her husband. Cases *supra*; *Cox v. Cox*, 19 Ohio State, 502; 2 Am. Rep. 115; *Maguire v. Maguire*, 7 Dana (Kentucky), 181; *Davis v. Davis*, 30 Illinois, 180.

A divorced wife may acquire a domicile for herself. *Bennett v. Bennett*, Deady (U. S. Circ. Ct.), 299. Even though only *a mensa et thoro*. *Barber v. Barber*, 21 Howard (U. S. Sup. Ct.), 582 (TANEY, C. J., and two others dissenting); *Hunt v. Hunt*, *supra*; *Vischer v. Vischer*, 12 Barbour (New York Supr. Ct.), 649; *Williamsport v. Eldred*, 84 Pennsylvania State, 129.

A wife entitled to a divorce is not bound to sue for it at the former joint domicile but may follow the husband to his new domicile. *Greene v. Greene*, 11 Pickering (Mass.), 410; *Masten v. Masten*, 15 New Hampshire, 159; *Harrison v. Harrison*, 20 Alabama, 629; 56 Am. Dec. 227; *Smith v. Morehead*, 6 Jones Equity (North Car.), 360; *Davis v. Davis*, 30 Illinois, 180; *Kashaw v. Kashaw*, 3 California, 312. But *contra*: *Hopkins v. Hopkins*, 35 New Hampshire, 171; *Schonwald v. Schonwald*, 2 Jones Equity (North Car.), 367; *Jenness v. Jenness*, 24 Indiana, 355; 87 Am. Dec. 335; *Dutcher v. Dutcher*, 39 Wisconsin, 651; *Kruse v. Kruse*, 25 Missouri, 68.

But she is not bound to pursue the husband; she may sue at the old domicile. *Hopkins v. Hopkins*, *supra*; *Shaw v. Shaw*, 98 Massachusetts, 158; *Dorsey v. Dorsey*, 7 Watts (Penn.), 319; 32 Am. Dec. 767; *Hull v. Hull*, 2 Strobhart Equity (So. Car.), 171; *Hanberry v. Hanberry*, 29 Alabama, 719; *Burtis v. Burtis*, 161 Massachusetts, 508.

The weight of authority here is that a wife entitled to a divorce may leave the joint domicile and acquire a new domicile for herself, even in another State. *Cheever v. Wilson*, 9 Wallace (U. S. Supr. Ct.), 108; *Harding v. Alden*, 9 Greenleaf (Maine), 140; 23 Am. Dec. 549; *Frary v. Frary*, 10 New Hampshire, 61; 32 Am. Dec. 395; *Ditson v. Ditson*, 1 Rhode Island, 87; *Sawtell v. Sawtell*, 17 Connecticut, 284; *Kinnier v. Kinnier*, 45 New York, 535; 6 Am. Rep. 132; *State v. Schlachter*, Phillips Law (Nor. Car.), 520; *Tolen v. Tolen*, 2 Blackford (Indiana), 107; 21 Am. Dec. 743; *Wright v. Wright*, 24 Michigan, 180; *Craven v. Craven*, 27 Wisconsin, 418; *Fishli v. Fishli*, 2 Littell (Kentucky), 337; *Shreck v. Shreck*, 32 Texas, 578; 5 Am. Rep. 251; *Moffatt v. Moffatt*, 5 California, 280; *White v. White*, 18 Rhode Island, 292.

Mr. Jacobs pronounces this doctrine "dangerous, and capable of misapplication and disastrous results." Domicil, p. 315. Some Courts have denied it. *Dorsey v. Dorsey*, 7 Watts (Penn.), 319; 32 Am. Dec. 767; *Prosser v. Warner*, 47 Vermont, 667; 19 Am. Rep. 132; *Maguire v. Maguire*, 7 Dana (Kentucky), 181; and see *Bradshaw v. Heath*, 13 Wendell (New York), 407; *Borden v. Fitch*, 15 Johnson (New York), 121; 8 Am. Dec. 225. Judge REDFIELD opposes it. 3 Am. Law Rev. (N. S.), 193, 222. See *Harrison v. Harrison*, 20 Alabama, 629; 56 Am. Dec. 227.

The doctrine certainly does not extend to any other cause of action than divorce. *Prater v. Prater*, 87 Tennessee, 78; 10 Am. St. Rep. 623 (homestead right).

The doctrine is said, on the one hand, to be necessary for the protection of the wife, but it is difficult to see why, because she can take advantage of

No. 3. — *Somerville v. Somerville.* — Rule.

all the causes for divorce recognized by the State of the domicile in the Courts of that State, and to take advantage of other causes is not recognized by that State as necessary for her protection. Her emigration to other States is almost always to get the benefit of other causes. For example, in New York, where adultery is the sole cause, a wife may have no ground for divorce, but still may be condemned to live with a drunken, cruel, or felonious husband, from whom in Illinois she could be freed. She therefore goes to Illinois for relief. Whether this is "dangerous" and "disastrous" is mere matter of opinion. The New York people think it is; the Illinois people think differently. At all Courts, the amount of this emigratory divorce is greatly over-estimated in popular belief. Statistics show that it does not amount to one fifth of the whole number; some put it at one tenth. Mr. Bishop is a stout adherent to the more liberal rule, and it has the weighty approval of the Federal Supreme Court.

No. 3. — *SOMERVILLE v. SOMERVILLE.*

(1801.)

No. 4. — *BELL v. KENNEDY.*

(1868.)

No. 5. — *UDNY v. UDNY.*

(1869.)

RULE.

A PERSON can have but one domicile properly so-called, *e. g.*, for the purpose of succession to personalty. It is either the domicile of origin or a domicile of choice.

Domicil of origin is fixed by the domicile of the parent at the time of birth. It is that of the father if the child is legitimate; if illegitimate, that of the mother.

The domicile of origin prevails until the person has manifested and carried into effect an intention of acquiring a settled home elsewhere. That is called his domicile of choice.

When a person, having acquired a domicile of choice in a new country, abandons that country as the country of his home, and has not acquired *animo et facto* a settled home in another country, he is deemed by law to have reverted to and become domiciled in the country of his domicile of origin.

 No. 3. — *Somerville v. Somerville*, 5 Ves. 750, 751.

The domicile of origin again continues until a new domicile of choice is acquired.

Somerville v. Lord Somerville ; Bayntun v. Lord Somerville.

5 Ves. 750-792 (5 R. R. 155).

Domicil. — Domicil of Origin. — Domicil of Choice. — Fact and Intention.

[750] The succession to the personal estate of an intestate is regulated by the law of that place which was his domicile at the time of his death. For that purpose there can be but one domicile; and the *Lex loci rei sitæ* does not prevail.

The mere place of birth or death does not constitute the domicile. The domicile of origin, which arises from birth and connections, remains, until clearly abandoned and another taken.

In the case of Lord Somerville, of two acknowledged domicils, the family seat in Scotland, and a leasehold house in London, the former, which was the original domicile, held, in the circumstances, to prevail.

The question in these causes was, whether the distribution of the personal estate of the late Lord Somerville, who died intestate, seised of real estates in Scotland and in Gloucestershire, and possessed of personal property in the English funds to a very large amount, should be made according to the law of Scotland or the law of England. The claimants by the law of Scotland were his Lordship's nephews and nieces of the whole blood, exclusive of Lord Somerville, as being the heir-at-law entitled to the real estates. They were the children of the intestate's deceased brother and sister of the whole blood, Colonel Somerville and Ann Whichmore Burgess. Sir Edward Bayntun, half-brother to the intestate, being the surviving son of Lady Somerville by a former marriage, and two nephews and two nieces, of the half-blood, being the children of a deceased brother and sister of the intestate by a former marriage, claimed to participate in the distribution under the law of England. Lord Somerville obtained letters of administration.

The following circumstances were established by the evidence.

That branch of the Somerville family, from which the late Lord was directly descended, had been wholly settled in Scotland [* 751] above * six centuries. His father, James, Lord Somerville, first came to England in 1721 at the age of twenty-three, for the purpose of prosecuting his claim to the Barony of Somerville.

No. 3. — *Somerville v. Somerville*, 5 Ves. 751. 752.

ville; which he established in May, 1723. In 1724 he married Mrs. Rolt of Spye Park; where he resided with her on her estate till 1726; when he returned to Scotland. His daughter Ann was born during that residence in England. He continued in Scotland, where his two sons, the late Lord Somerville and Colonel Somerville were born, till 1731; in which year he went to Bristol on account of Lady Somerville's health. In 1732 he returned to Scotland; and continued there till Lady Somerville's death in 1734; when he went to England to bury her and to surrender her estate to Sir Edward Bayntun, one of her sons by a former marriage. In 1736 Lord Somerville married again; and immediately returned to his residence in Scotland; where he continued till 1741; when he was elected one of the Sixteen Peers; and came up to attend Parliament; and resided three winters in London for that purpose, going in summer to his estate in Scotland. In 1744, being appointed a Lord of Police in Scotland, he went to reside there; discontinuing from that time his Parliamentary attendance. He continued in Scotland, till he went to England in 1760 or 1761 to be presented to the King and to visit his daughter. After passing six weeks in England on that occasion he returned to Scotland; and never again quitted it; dying, at his house there in 1765. His residence in Scotland was at the family seat, called The Drum or Somerville-House, in the summer, and at apartments, which he had in Holyrood-House, in winter.

The late Lord Somerville was born on the 22d of June, 1727, in Scotland, either at Somerville-House, or at Good-Trees, an old mansion in the neighbourhood, rented by his father, while the house was re-building. He remained there till the age of nine or ten years; in the course of which period he was at school at Dalkeith, and afterwards at Edinburgh. At the age of nine or ten he was sent into England to Mr. Somerville in Gloucestershire. He was at school there for some time; afterwards in June, 1742 he went to Westminster School; which he quitted at Christmas, 1743. He then went to Caen in Normandy for the purpose of education; where he remained till the age of eighteen; when upon the rebellion breaking out in Scotland in 1745 being sent for by his father he returned to Scotland; joined the royal army as a volunteer; and was present at the battles of Prestonpans and *Culloden; at which he served as an aide-de-camp to [*752] Generals Cope and Hawley. He continued in the army

till the peace in 1763 ; and at different times during that period was in England, Scotland, and Germany, wherever his regiment happened to be, either in quarters or in service. Soon after quitting the army in 1763 he went to Scotland, to Somerville-House ; and his father settled an annuity upon him. He then went abroad. In September, 1765, on account of his father's illness he returned to Scotland ; was present at his funeral in December in that year ; and continued in Scotland about six months afterwards ; but not succeeding in an application for his father's apartments in Holyrood-House he went to London ; but did not turn off any of the servants at Somerville-House. From this period, in 1766, there was no evidence as to the actual residence till 1778 or 1779¹, farther than that he passed the winter in London and the summer at Somerville-House. In 1779 he took a lease of a house in Henrietta Street, Cavendish Square, for twenty-one years, determinable at the end of seven or fourteen years, at a rent of £84 a year. He continued to occupy this house as his winter residence till his death ; going every year to Somerville-House for the summer ; and dividing the year nearly equally between them. The landlord of the house having purchased the ground-lease, of which thirty-six years were unexpired at Midsummer, 1787, Lord Somerville endeavoured to get him to relinquish it for a premium ; and expressed regret at the refusal. Being assessed to the taxes at £90 per annum, he appealed ; and was reduced to £84 per annum. About ten years before his death he was elected one of the Sixteen Peers ; and he attended his Parliamentary duty every winter.

In Scotland Lord Somerville's establishment and style of living were suitable to his rank and fortune. In London he had only one or two female servants ; and brought two men-servants from Scotland ; taking them back with him ; and using job horses occasionally. His manner of living here was very private ; seeing no company ; dining usually at a club ; and keeping his servants on board wages. The house was out of repair ; and furnished upon a very limited scale. The furniture, with the wine, coals, and [* 753] plate, sold only for £66 7s. 1d., and the fixtures * for £73 10s. To some of his friends he declared repeatedly, that

¹ The fact was, that during the former part of that period Lord Somerville had furnished lodgings in London ; and during the latter part occupied the house, of which he afterwards took a lease ; which appeared by the parish rates since 1773 ; beyond which they could not be found.

No. 3. — *Somerville v. Somerville*, 5 Ves. 753. 754.

he considered his residence in London only as a lodging-house, and a temporary residence during the sitting of Parliament; and spoke of Scotland as his residence and home, where he was born, with the warmth of a native; and he often complained with acrimony, that in any disputes which he had, which came before the Session, it appeared to be a disadvantage to him residing so little among them. About a month before his death Colonel Reading urged him to make a will; observing, that it would be cruel to leave his natural children without provision; upon which he said he meant to take care of them and also of his brother's younger children; and soon after this conversation the intestate told Colonel Reading (the deponent), that he had seen Sir James Bland Burgess; who had alarmed him by telling him, if he died without a will, his personal estate would be divided among the several branches of his family; which he much deplored; and afterwards he said he should soon go to Scotland; and would then make his will.

Soon after that conversation Lord Somerville died suddenly at his house in London in April, 1796, during the sitting of Parliament. In the books of the Bank of England he was described as of Henrietta Street, Cavendish Square.

Elizabeth Dewar, who had been housekeeper at Somerville-House, by her depositions stated, that she had heard the intestate say, he was an Englishman; and when she told him that, when speaking against Scotland, he was speaking against his own country, he would answer, that he was born in Scotland; he was educated in England; his connections were English; that he had no friend in Scotland; and everything he did was after the English fashion. The deponent had heard him say, his reason for going to Scotland was, that he might be at his estate; that he did not like it; but had promised his father, when dying, that he would live one half of the year in Scotland, and the other in England; that he considered himself an Englishman; that his estate in England was preferable to that in Scotland; that he preferred England; and would never visit Scotland except on account of the promise to his father; and that he did not care though Somerville-House were burnt; and this he frequently said in conversation with the witness.

There was some farther slight evidence of expressions [754] importing a preference of England; and that he considered himself an Englishman.

The Attorney-General, the Solicitor-General, Mr. Newbolt, and Mr. McIntosh, for the plaintiffs in the first cause; Mr. Mansfield, Mr. Adam, and Mr. Lockhart, for defendants in the same interest claiming as next of kin of the whole blood by the law of Scotland.

The decided cases put entirely out of sight the *Lex loci rei sitæ* with reference to this question.¹

Excluding the *Lex loci rei sitæ*, the Court must have recourse to the law of domicile; and the question must now be [*755] taken to be, *where the late Lord Somerville is to be considered as having had his domicile at his death. At his birth without question his sole domicile was in Scotland; the only place, with which he had any connection. His father had no establishment in England. When he was in this country as one of the Sixteen Peers of Scotland, he resided chiefly with the Bayntun family. There can be no doubt therefore as to his domicile; and the domicile of origin of the late Lord, the place of his birth, continued during his father's life. During that period, he had no other domicile than the house of his father. He had no other fixed and settled habitation. As heir-apparent of the family he is to be considered in a different light from a younger brother. The heir-apparent must always look to the family house and estate, as that to which he is to return, and which is to be his,—an object of residence and attachment, which does not belong to the other branches of the family. At his father's death in 1765 he had no house except Somerville-House. If he had died at that period, there could have been no doubt. There was no place in England that could be deemed his domicile; though he had an estate in Gloucestershire. It lies upon the other side to show, that the clear, unquestionable domicile, gained by birth, which continued during the life and after the death of his father, was abandoned and given up, and that he ceased to be a resident in Scotland. From 1765 to 1778 there is nothing to change the domicile. From that period though he resided in the winter in London, and only in the summer in Scotland, his permanent and constant residence must be taken to be Somerville-House, not the house in London, though held upon a term that was likely to endure beyond his life: but the nature of the residence was not of

¹ See English notes to *Enghin v. Wyllie*, No. 1 of "Administration," 2 R. C. 74.

No. 3. — *Somerville v. Somerville*, 5 Ves. 755, 756.

that description which is emphatically styled *domicilium*, and in the Civil Law¹ is thus described: *Ubi quis Larem rerumque ac fortunarum suarum summam constituit.*

Somerville-House without doubt was considered by Lord Somerville as his fixed and permanent residence, that of his family; and the other * a residence of convenience. He [*756] was a man of economy: but it is clear upon the whole evidence he lived more in the style of a nobleman at Somerville-House; and certainly by no means so in Henrietta-Street. His residence for the purpose of Parliamentary duty, on being elected one of the Sixteen Peers in 1790, would have no effect. It is very convenient that the original domicile should continue, unless an abandonment is shown; and it is agreed by all writers on this subject, that from the moment you fix the domicile, an abandonment and a complete substitution of a new domicile must be shown. It is not enough to show residence in another place, the residence in the ancient domicile likewise continuing. The one must completely supersede and do away the other. The presumption in all cases therefore is against change of domicile; and the burthen of proof lies on that side. By residence as an officer in quarters in England a new domicile could not be acquired. As to Lord Somerville's winter residence, which was lengthened as he grew older, admit that he resided seven months of the year in England: is that a sort of residence under all the circumstances that supersedes the domicile he had; showing a purpose to abandon it to all intents? Suppose in 1766 he had yet a domicile to choose, and there was nothing to go upon but a residence in both countries, beginning at the same period, yet, taking with that the circumstances, — that his residence in Scotland was upon his paternal estate, the seat of his honours, where his ancestors lived upwards of 600 years, the other in no way connected with his family, in which he lived in no state, a common lodging-house, — the domicile must have been in Scotland. In Scotland he lived as a nobleman, anxious to keep up his dignity, as connected with that country; and, though a man of economy, he lived there in a manner suited to his dignity. In England he had no furniture, no establishment; he saw no company;

¹ Cod. Lib. 10. tit. 39. l. 7. See also Dig. Lib. 50. tit. 16, l. 203, which is thus expressed: —

“Eam domum unicuique nostrum debere existimari, ubi quisque sedes & tabulas haberet, suarumque rerum constitutionem fecisset.”

the servants he brought to town were part of his Scotch establishment, which was a regular establishment. How could it be said, when he was leaving town, going to his castle in Scotland, that he was going from home, as a sojourner, a stranger, a visitor; and that returning to London he was going, *ubi Larem rerumque ac fortunarum suarum summam constituit?*

[757] The description of Lord Somerville in the banks books is merely that of the broker; and can afford no inference. Some of the witnesses speak to little expressions, denoting that he wished to be considered an Englishman, and liked better to live in England than Scotland. That, which, it is to be observed, rests principally upon the suspicious evidence of a discarded servant, determines nothing. This is a question of fact. Dean Swift was very anxious to be considered as an Englishman; but he must have been considered domiciled in Ireland. It is idle to enter into little circumstances of that kind against such a weight of evidence. In *Balfour v. Scott* (H. L. 11 April, 1793, 6 Bro. P. C. 550), we were obliged to make use of such circumstances; which are only incidents in this case. Mr. Scott had the intention of completely abandoning his domicile in Scotland about twelve years before his death. His known purpose was that of watching the funds; in which he had invested his property. In the prosecution of that known purpose he broke up his establishment, leaving only a gardener: he only went two or three times to Scotland; and upon those occasions never resided at his own house, but was a visitor with his friends; and for the latter part of his life he never went to Scotland. He had clearly chosen a different domicile; which completely did away the *domicilium originis*.

In the case of Sir Charles Douglas. (*Ommaney v. Bingham* before the House of Lords, 18th March, 1796), the circumstances were these: He left Scotland in 1741, at the age of twelve, with a view to enter into the navy. From that time to his death he was in Scotland only four times. 1st, as captain of a frigate: 2dly, to introduce his wife to his friends; on which occasion he staid about a year: 3dly, upon a visit: 4thly, when, being appointed to a command upon the Halifax station, he went in the mail coach to Scotland, and died there, in 1789. He was not for a day resident there in any house of his own; nor as a resident. Under those circumstances it was strong to contend

No. 3. — *Somerville v. Somerville*, 5 Ves. 758, 759.

that he retained the domicile *during all that time [*758] in a country, with which he had so little connection.

He had no estate there, no mansion-house. He was not a Peer of that country. There was nothing but the circumstances of his birth and his death; and upon those circumstances, and because he had an occasional domicile there, the Court of Session determined that he was domiciled in Scotland. He married in Holland; and had a sort of establishment there. He commanded in the Russian navy for about a year; and was afterwards in the Dutch service. He had no fixed residence in England till 1776, when he took a house at Gosport; where he lived as his home, when on shore. That was the only residence he had in the British dominions. Whenever he went on service, he left his wife and family there; and he always returned to that place. His third wife was a native of Gosport. In his will he spoke of his dwelling-house at Gosport. Under these circumstances the cause came before the House of Lords. The Lords considered the circumstance of his death in Scotland, going there only for a few days, as nothing. The LORD CHANCELLOR expressed himself to the following effect:—

“The reasons assigned in support of the decision of the Court of Session are by no means satisfactory. His dying in Scotland is nothing; for it is quite clear, the purpose of going there was temporary and limited, nothing like an intention of having a settled habitation there. The question never depends upon occasional domicile: the question is, what was the general habit of his life? It is difficult to suppose a case of exact balance. Birth affords some argument; and might turn the scale; if all the other circumstances were *in æquilibrio*: but it is clear in this case, his circumstances, his hopes, and sometimes his necessities, fixed him in England. His taste might fix him at Gosport in the neighbourhood of a Yard: a place also convenient to him in the pursuit of his profession. Upon his visit to Scotland, by a letter he guarded his sister against the hope of his settling there.”

The LORD CHANCELLOR then takes notice of his making [759] a will; which would be totally subverted by considering him domiciled in Scotland. It became important to determine the domicile in that case; because by a codicil he had imposed a condition in restraint of marriage upon a legacy to his daughter,

with a gift over to other children; and it was contended, that the condition was void by the law of Scotland, but good by the law of England on account of the gift over. (See *Stackpole v. Beaumont*, 3 Ves. 89, and the references.) If Sir Charles Douglas had died in the Russian or Dutch service, his property must have been distributed according to the law of Russia or Holland; for he had made himself a subject of those countries; and by his establishments there had lost his establishment in Scotland. His original domicile having been abandoned, when he afterwards entered into the service of this country he became domiciled here; as a Russian or Dutchman would on entering into our service.

Lord Annandale's Case, Bempde v. Johnstone (1796), 3 Ves. 198, is still weaker. There was not even the circumstance of birth in Scotland; and, with respect to Marquis William, he did not return to Scotland after his Parliamentary duty was closed; and there were other considerable circumstances, importing an intention to continue in England. The decision was properly founded upon this fact; that till a considerable period after the birth of Marquis George, there was nothing that could by possibility afford a ground for contending that he had a domicile in Scotland; and it was considered by the LORD CHANCELLOR, that it was necessary to show that he had abandoned the domicile in England; and gained one in Scotland; for which there was no pretence.

Can these cases be at all compared with this? Lord Somerville never for a year together abandoned his residence in Scotland. In point of duration he had full as much residence there as in this country; abstracted from the circumstances that make that quite a different residence from this. In this case there was a mansion-house actually resided upon. Suppose he had lived several years entirely in England, going only occasionally to his mansion in Scotland; still that must have been considered his residence. His death in London happened in April, before the period of his usual annual return to Scotland. No intention is to be inferred *from that; on the contrary there is

direct evidence of his intention to get back to Scotland, when attacked by illness, and an intention, when he should get there, to make an arrangement of his affairs looking to the law of that country. But it is sufficient to say he died in the course of that temporary residence every year in England; and there is

No. 3. — *Somerville v. Somerville*, 5 Ves. 760, 761.

nothing to show, he had abandoned the intention of returning, as usual.

• The MASTER OF THE ROLLS (ARDEN):—

Have there not been any cases in the Spiritual Court with reference to this point upon the Custom of the Province of York (2 Burn's Ecc. Law, 746)? There must have been many instances of two residences: one within the Province; the other without it. Then would the place of the death make a difference? The Custom, as expressed, affects the goods of every inhabitant dying there, or elsewhere.

I cannot form to myself any other argument for those who claim by the law of England, except that his death makes a difference, considering the residence equal. Therefore what do you say to this case? Suppose a man, having a *forum originis* in some other part of the world, comes to live and to have a residence here and in Scotland, dividing his time equally between them.

For the plaintiffs.

[761]

To make that case bear upon this, the question must be put as between the *forum originis* and the place of his death. Supposing a fixed, clear domicile in Scotland, and then a degree of residence in England from thenceforth quite equal to that in Scotland, the circumstance of his death is not of the least weight; for if the domicile is once fixed, you must show a change of domicile. The death is accidental; and in *Sir Charles Douglas's Case* was laid entirely out of the question. The case of a man without a domicile cannot exist. If a child being illegitimate cannot have the domicile of his father, it must be the place of his birth; if he is born on board ship, the place to which the ship belonged; if no other domicile can be found, the place where he was at his death. Every person must have a habitation of some description.

But this is not a case of *equilibrium*; which, if such a case can be supposed, must arise either from the habits of a vagrant life or an equally divided residence, with the absence of all evidence of birth or extraction. The question of domicile depends upon facts and circumstances of residence, proof and presumption of intention of residence. The desire of the Roman Jurists to systematise and subtilize has occasioned their giving much greater weight to the circumstances of birth and extraction than they really deserve.

The late decisions, agreeing with Bynkershoek, one of the greatest of them, in bringing it back to the true consideration, have held that those are only some of the circumstances. In *Bruce v. Bruce*, 7 Br. P. C. 566, Major Bruce, born in Scotland, but settled in India many years, professed an intention to return to Scotland; but not till he had acquired a competent fortune; and he died in India. He was held domiciled in England. That decision weakened the force given by the Jurists to the circumstances of birth and extraction; and determined, that a mere intention, depending upon a very doubtful event, would not do;

that it must be a residence with a view to make it perpetual. [*762] But though birth and extraction *were there decided not to be everything, yet it was not held that they are not circumstances of great importance.

Lushley v. Hogg only confirmed the principle, that the *Lex domicilii* is always to rule, and not the *Lex loci rei sitæ*; more strongly confirmed in *Balfour v. Scott*. In *Sir Charles Douglas's Case* there was nothing in favour of the Scotch domicile but the doctrine of the Civilians, and the extravagant weight given to the circumstances of birth and extraction. The English domicile prevailed rather by the weakness of the Scotch domicile than by its own strength. The same observation applies to *Lord Annandale's Case*, the Scotch domicile resting upon mere extraction, aided by property and rank; for even birth was wanting. That certainly, as the LORD CHANCELLOR observes in that case, is a very small circumstance, being accidental; and the mere place of death is much more insignificant; for all other circumstances being equal, the circumstance of birth, slight as it is, might turn the scale, affording some presumption of affection; but that presumption, which alone can give any weight to the accident of birth, cannot be raised in the other case, of the death, which is liable to the same objection as the *Lex loci rei sitæ*, making the rule depend on accident, quite independent of the intention.

The next circumstance, *rerum fortunarumque summa*, was wanting in *Bruce v. Bruce*, and other cases. The next, the rank and dignity of Lord Somerville, of itself furnishes a link of connection; but the most important circumstance is, that the connection created by rank is strengthened by duty, as one of the Sixteen Peers. That is strong, as a link of connection with Scotland, and a reason for a temporary residence in England. The

No. 3. — *Somerville v. Somerville*, 5 Ves. 762, 763.

general principle of all the laws of Europe is, that a permanent public duty changes the domicile; that a temporary public duty does not. The word *legatus*, as used by the foreign lawyers upon that subject, was applied chiefly to the deputies of the towns and provinces of the Empire coming to present petitions. Huber applies this doctrine of the Roman law to the deputies of the Dutch provinces attending their duty at the Hague; concluding, that residence for that purpose does not take away the original domicile; and the same was decided by a court of very considerable authority, the Rota of Rome, *Farnese Decis. Rom.*, and is adopted by Denisart, in his collection with regard to the law of France.

This circumstance is not to be found in any of the [763] other cases. Another circumstance is the nature of the establishments, where the residence is pretty nearly equally divided between the Capital and the country-seat. With respect to that, in the case of a nobleman or a gentleman of landed property, all other circumstances being equal, the circumstance of the country-house being upon his landed estate ought always to preponderate; and the other residence is to be considered secondary only. In this instance all the causes of preference from birth, rank, and also the *rerum fortunarumque summa*, apply to Scotland. Huber quotes a decision of the Supreme Court of Friesland, upon the 2d of July, 1680, precisely upon that point, by which the domicile was held to be at the country-house; and his observation upon that is, that where the principal concerns are in town, that is the domicile; where in the country, the country residence.

In Denisart, Article Domicil, are three cases, decided by the Parliament of Paris: one is the case of Mademoiselle De Clermont Santoignon; another is that of the Count De Choiseul, in 1656, who was held to be domiciled in Burgundy, though he went there only in the shooting season; and an opposite case is mentioned of a Bourgeois in Paris, who paid the Capitation tax in the country; but that was held to be only his secondary residence, his principal concerns being in Paris. In Denisart Dictionnaire 2, letter D., p. 165, it is laid down, that the original domicile is constituted the first domicile; and that is preserved till another is chosen. With respect to the particular question, the distribution of the personal estate, it is laid down: that the domicile continues

until changed; and the reason is the presumption of attachment to the place of birth and connections. Several cases are stated, all tending to establish the same point. From those cases it appears, a minor could not do any act to change his domicile; that a military man shall be presumed to have his *domicilium originis*, unless it is quite clear he meant to establish another; and unless that appears, in the case of a military man they always have recourse to the original domicile. In D'Aguesseau's Collection, Vol. v. 115, the case of the Duke of Guise is stated; a case, not strictly relative to the distribution of personal estate, but applying to this subject. The question was, whether it could be said, he had no domicile; or, that his domicile was not at Brussels; and the conclusion is, that the former is absurd; the latter more so; for all persons serving the King of Spain in Flanders cannot be [* 764] considered * to have their domiciles elsewhere than in the Capital of the Low Countries. Every great lord is considered as having his domicile in the Capital, unless he has another in point of fact; but the Capital is resorted to only, in case there is in point of fact no other.

Apply that doctrine to this case, in which there is a domicile in point of fact.

Other cases are to be found in the same author. The case of a bastard is stated (Vol. vii. 373); and upon the question, what destroys the domicile of birth, it is laid down that nothing has that effect but clear facts tending to establish this principle, -- a relinquishment of the native country, and a clear purpose of establishment elsewhere; and the number of years is limited. Cochin states the case of the Princes of Germany. He also states (Vol. v. 1), the case of the Marquis De St. Paterre, who was born in Mayenne, became a page, and afterwards entered the army. He lived sometimes at Paris in hired lodgings; sometimes at the house of a friend; called in some acts of his hotel. He returned to the place of his birth, and died there. The question was, whether the *domicilium originis* was destroyed; and it was held, not: and the reason is, that his residence at Paris was not more than was necessary in his way of life as a military man; that he kept his country-house; had there all his *instrumentum domesticum*; and notwithstanding some acts done at Paris, the original domicile remained.

This is a precedent in all points applicable to the case now

No. 3. — *Somerville v. Somerville*, 5 Ves. 764, 765.

before the Court. Upon the doctrine of these cases it is clear, that where the *domicilium originis* is connected with birth, ancestors' property, muniments necessary to the support of that property, and acts done in respect of it, to get rid of that domicile there must be clear, distinct, positive facts, combined with intention. Death is nothing without intention and volition; but where there is a previous intention of residence, confirmed by the fact of residence, the fact of death is a circumstance that will be taken into consideration to fix the domicile; but in this case the fact is quite the other way, and the death merely accidental in London.

In *Bruce v. Bruce*, the interlocutor was affirmed, and the only reason of Lord THURLOW's delivering any opinion was, that the ground he took was different from that of the Court of Session. * Mr. Bruce was a younger son. The whole of [* 765] his personal estate was situated either actually in England or in India. The Court of Session determined upon the *Lex loci rei sitæ*. Lord THURLOW, thinking that erroneous, entered into the question of domicile; and according to a very authentic note, he was very unwilling to go into the question. Mr. Bruce, originally a younger son without fortune, was only once in Scotland. He returned from London to India, and never showed any intention of returning to his native country: nothing appeared but some expression a little before his death, that he wished to be considered a Scotchman. That is not like this original, continued connection with Scotland, attended with rank, property, &c. Mr. Bruce resided in India his whole life, except about one year in London.

In *Balfour v. Scott* (H. L. 1793), 6 Bro. P. C. 550; edit. 1803, I admit, Mr. Scott was the son of a gentleman of property; but during the latter part of his life he did clear acts of desertion of the *domicilium originis*; selling off his establishment, dismissing his servants, &c. He was only once or twice in Scotland, and then in the house of a relation. His whole attention was applied to this country. He had no intention of returning to Scotland: on the contrary an intention of not returning was demonstrated by facts; and he had made it impossible to go to his own home in Scotland. It is impossible to apply that case to this: Lord Somerville's residence in London being a mere lodging house, all his muniments, furniture, &c., being in Scotland: though a man of economy, having great regard for the honor and dignity of

his family, living penuriously in England, in Scotland like a nobleman of his fortune at his family-seat; returning constantly to his home, which was always established as his home; a home consistent with his rank in life and the show belonging to it.

The case of Sir Charles Douglas has but one feature of similarity to this, — the entry into the service at an early period of life. The distinction is, that Lord Somerville, upon the death of his father, returned to his residence in Scotland, and fixed himself there, having only a temporary residence in London. Sir Charles Douglas, after a long naval life, partly in different foreign services, established himself at Gosport; and there was no reason to suppose he ever meant to have a permanent establishment in Scotland. In *Lord Annandale's Case* there were some cir-

[* 766] cumstances of similarity; * others directly opposite; and

all these cases, being mere clues for the direction of the judgment of the Court, must be considered with all their circumstances. William, Marquis of Annandale, lived in Scotland in the house of his first lady; which, after her death, passed into the Hopetoun family. He was one of the Sixteen Peers. After his second marriage he never returned to Scotland; he lived in England, and died at Bath. Marquis George was born and educated in England. His visits to Scotland during a period when there were great doubts of the sanity of his mind, were made as to a country where he had no home. The only evidence was, that he stamped with his foot upon the ground there, and said, "Here I build my house." Compare that case with this. The LORD CHANCELLOR in his judgment has very accurately summed up the points establishing the domicile of Lord Annandale, showing what would be his judgment upon this case. The principal circumstances are reversed here. Lord Somerville was born in Scotland; his expectations of fortune, settlement and establishment were there; he always had a residence in Scotland, Lord Annandale never; the existence there of Lord Annandale purely a purpose of either visit or business, and wherever he had a place of residence that could not be referred to an occasional and temporary purpose, that was in England. In this case the residence was temporary in England. Upon comparison of the cases the same principles must determine in favour of the Scotch domicile, which was never changed. The reason stated by Lord HARDWICKE against the adoption of the *Lex loci rei sitæ*, that it would prevent

foreigners purchasing in our funds, is equally strong against changing the *domicilium originis* upon slight circumstances.

When did Lord Somerville begin to acquire a domicile in England? If not in the first six months, he never did. As to his actual residence, the time he was at Westminster School must be subtracted, according to all the Jurists; and as to the remaining period, considering the particular reason of it, and the establishment kept up in Scotland, there is nothing like an equilibrium. The only positive evidence in favour of the English domicile is, that he expressed a dislike to Scotland, and said, his reason for going there was the dying injunctions of his father; but the wish of the party has no effect in constituting a domicile, though the intention certainly has. That evidence proves decisively his intention to *keep up his Scotch residence. In *Bruce* [*767] *v. Bruce*, there was only birth, and paternal residence and extraction, with an intention to return at some time uncertain. In *Balfour v. Scott* there was a complete abandonment, and change of establishment. In *Sir Charles Douglas's Case* there were birth, and paternal residence, and extraction, but neither property, nor estate; and there was positive intention never to settle in Scotland. In *Lord Annandale's Case* there was property and rank; but neither birth, nor public duty, nor any of the circumstances to be found in this case. All presumption is in favour of the Scotch domicile, and nothing in favour of the English but this particular residence of a few months in the year, accounted for in a great degree by public duty, and admitting he took the house antecedent to the commencement of that duty, answered by the establishment kept up in Scotland. The evidence of his intention to make a will upon his return to Scotland, alarmed at the possibility of a distribution that would take in the half-blood, proves, that he had not a person in this country whom he intrusted with the management of his affairs.

With respect to the supposed case put by the Court of a foreigner coming here, having a domicile abroad, or no known domicile, and then an equal residence, — upon the question, whether the death shall not decide, the analogy to the rule in *Godolphin*, Part i. c. 20, fo. 58, as to the place where the will is to be proved, goes a great way to decide that. In the case stated from *Cochin* the death was connected with circumstances of intention and establishment; but in *Sir Charles Douglas's Case* it was considered of no

weight, notwithstanding his connections in Scotland, being merely accidental. Lord Somerville died with a clear intention to return to Scotland; the Parliament then sitting, and the period of his return not arrived. The place of his death therefore was mere accident, not coupled with intention, or any fact denoting it.

The only case that can be found applicable to the custom [*768] of the province of York is *Chomley v. Chomley*, 2 Vern.

48, in which it was held, that the Custom of London, where the residence was, controlled the Custom of York. The privilege of strangers to have a distribution according to the law of their own country depends upon a principle of the law of nations.

Mr. Piggott, Mr. Lloyd, Mr. Romilly, Mr. Sutton, and Mr. Steele, for the defendants, claiming under the law of England.¹

This question arises upon the death of a person in London, where he had lived for a great number of years; the property also is found here, the bill filed, and administration taken out in this country; and all the parties to the cause are here. This case does not afford the singularity of a foreigner coming here and claiming under a foreign law. It is the common case of the death of a person in London having property and relations here. Those who claim this property exclusively call in the aid of a foreign law, which has no recommendation or title to preference over the law of this country from its superior reason or wisdom. This question is recent in this country. The courts of justice will not resort to foreign law without great caution and considerable regret; particularly upon questions of fact, which, if depending upon the mere opinion of the Judge, unrestrained by any rules of law or evidence, must come to arbitrary decision.

[769] Where the evidence is so extremely equal, that the Court finds itself in that situation that it must resort to something else than residence, as it does when it resorts to the domicile of origin, then, this being the country where the property is, where the intestate resided, and had a domicile, friends and connections, when the origin has been so long out of the question, why is the Court to adopt that for the sake of adopting a law distinguished neither for wisdom, reason, or humanity, and to reject the law of the country in which it sits? Inextricable confusion

¹ Mr. Richards, for the defendant his wishes were in opposition to it, did Lord Somerville, observing, that, though not argue the question. his interest was under the English law.

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will be the consequence if the circumstances of this case do not prove the domicile in this country. When the territorial property goes according to the law of Scotland, there can be no reason to complain of injustice to these persons. It is impossible upon the cases in the House of Lords to suppose, that the domicile of origin was the rule resorted to. If they were persons living in the world, in the pursuit of fortune, foris-familiated, the question was, where was their domicile? where did they live at the time of their deaths, not of their origin? If the origin is the principle, it must have had an effect in those cases infinitely beyond what it can in this. If origin is to be looked to, it is impossible to conceive a case in which that must not decide. This is a question of fact; a question which it was the object of the House of Lords, and of this Court in the only case decided in this Court, to simplify as much as possible; to avoid the difficulties into which the question will run if the doctrine the Court has heard upon this occasion is warranted.

It is only necessary to read the LORD CHANCELLOR's judgment in the last case to decide, where was Lord Somerville's home in 1796; when he died; where was the seat of his affairs; where, in the words of the Civil Law, did he pass his festivals; and where was his property. This residence has been stated as if it was occasional and temporary. The question for a jury would be, was not this the peculiarly chosen abode; not cast upon him by accident in 1796 and at his death in that year? Nothing can constitute a choice, if this case does not afford evidence that he exercised it. What is there to show this is not the place where Lord Somerville would have been, no particular circumstances determining *his position in some other place, [*770] according to the LORD CHANCELLOR's expression (3 Ves. 202), Where is the *animus revertendi* to be found? Where was the seat and centre of his affairs and the management of his fortune? Can it possibly be doubted that it was in London? He had a small paternal estate in Scotland which he did not sell; and if in the summer, when no man of his description is found in London, if his economical turn induced him, instead of a watering place, to go and have the satisfaction of seeing his paternal estate, could that change his fixed and permanent residence? If in the progress of things that estate was of more value at his death, yet there is no comparison between his property in the two countries; the

No. 3. — *Somerville v. Somerville*, 5 Ves. 770, 771.

estate in Gloucestershire exceeding £1000 a-year, and the property in the funds amounting to £50,000 or £60,000; of itself more than countervailing the estate in Scotland. In the books of the bank, constituting his only title to this vast property, he is invariably described as of Henrietta-Street, Cavendish-Square.

This case has many circumstances like Mr. Scott's. He kept his family estate, a large estate; and the house was not quite dismantled, for he kept one room; yet it was held that the domicile was in England, though his residence here was only for the last nine years of his life, which in this case is thirty years. It is in evidence also, that Lord Somerville had natural children,¹ and was not married. The LORD CHANCELLOR in *Lord Annandale's Case* refers (3 Ves. 202), to the habits of his life, his friends and connections, and all the links that attach him to society. In this instance all his habits, connections, and pursuits are found in London. Are these children, with the claim they have upon him, and the natural relation avowed by him, no tie or connection upon such a question? Lord Somerville laments that he suffered some inconvenience from not residing sufficiently in Scotland. That shows England was his home. He does not deny the consequence of his residence in England, or say that it shall be changed. He merely complains of it as an inconvenience. That is an express and unequivocal affirmance of that, which was the effect of his own choice; the domicile he invariably had in London.

[771] Next, as to the nature of the establishment in London; the manner of life is objected to, not the constancy of it, which is the circumstance to constitute a domicile; not the manner of living there, whether parsimoniously, or otherwise. Suppose he dined frequently at a club, kept his servants on board wages, and did not see a great deal of company; is that to give a character to his residence? or, that he travelled down to Scotland and received the compliments of his friends and neighbours on his arrival, and left servants there on his return to London? His motive might have been not to part with the family estate and the house built by his father, and left by him unfinished. Are we to compute the hours he passed in each place? In *Bruce v. Bruce* what became of origin? There was a clear intention of returning.

¹ The Court expressed surprise, that forward by evidence. An inquiry was the circumstances as to these children, proposed; but was not directed, which might be material, were not brought

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Mr. Bruce was a gentleman of family. His residence in India was for a temporary purpose, to establish a fortune; not intending to take up his residence there, but a fixed intention to return in his mind. If origin, coupled with residence for a temporary purpose, and an intention to return, is to decide, it must have had effect in that case; yet the distribution was held to be according to the law of England, by which India is governed. Why is not the long residence in this case employed in the acquisition and management of fortune, to have the same effect against the domicile of origin? The reasoning would be correct in subtracting the residence on account of his being in Parliament, if the residence had been taken for that purpose.

How can *Balfour v. Scott* be reconciled with their argument? There was a paternal estate and a mansion-house; but for the last nine years he had visited Scotland but three or four times. In *Sir Charles Douglas's Case* what was the residence to repel all the circumstances; birth and death in Scotland, a respectable Scotch family, service in the British navy, then in the Dutch, then in the Russian, then in the British again? Merely, that he had a house in Gosport, which he quitted in 1783, dying in 1789. In that interval he had been in Amsterdam, where he had married his first wife. In the Annandale cause the domicile of the father was resorted to; which was thought material, as it was supposed what Marquis George had done during his long lunacy had not fixed a character upon his residence in this country. If the acts done in that case were sufficient to shut out the question of the domicile of the father, *a multo fortiori* there is a choice of domicile * in this case. Was the residence here constrained from [* 772] the necessity of his affairs? Was it transitory, as a sojourner, according to the expressions of the LORD CHANCELLOR (3 Ves. 202)? Was it for a temporary purpose? The residence of Lord Somerville was the seat of his fortune. It was not the place of his birth, but upon that the LORD CHANCELLOR says the least stress is to be laid; but it was the place of his education,¹ which is a link in the connecting chain. Lord Somerville prided himself on his English education; the object of which upon the evidence was to avoid the Northern dialect. Consider also what the LORD CHAN-

¹ The MASTER OF THE ROLLS here where he was at school, but education observed, that he could not think the coupled with the residence of his parents. LORD CHANCELLOR meant the place,

CELLOR says in the same place of the Douglas cause. The conclusion is, that where there is positive, fixed residence, it is not a question of more or less of it, but it excludes the *domicilium originis*. We are discussing, what will has been exercised upon the subject. The visits of Lord Somerville to Scotland might be under the injunction of his father, the opposite to choice. Safety and certainty are on one side of this question; on the other the utmost uncertainty and inconvenience. There was no such length and character of residence in any of the cases in the House of Lords. Lord Somerville, a month before his death, speaking of his object to provide for his natural children, and his brother's younger children, states his intention to make a will to prevent his property from being torn to pieces. The fair inference is, that he did not deny the effect of his acts. A declaration under such circumstances, not qualifying, but proposing a remedy, is perfectly consistent with the permanent domicile in England. It would be equivocal, if the natural children were the only objects; but the object also was to exclude the half-blood from his intention in favour of Colonel Somerville's children. Upon the other construction he would have said, he did not mean permanent residence by all this. The question must be decided by fixed residence, though, where there is no fixed residence, the domicile of origin may be resorted to. In *Burn v. Cole*, Amb. 415, Lord MANSFIELD said, that in *Pipon v. Pipon*, Amb. 25, the distribution of an intestate's effects was held to be according to the laws of the country where the intestate resided and died; and in a case there cited his Lordship says, that case ought to [*773] have been decided *upon the residence. In the former of those cases the residence in London that destroyed the effect of the residence in Jamaica, was not more than a year. *Pipon v. Pipon* was decided upon the ground that debts follow the person of the creditor.

The Roman law is to be laid quite out of the question upon this subject. The very definition of the domicile by that law is quite inapplicable to modern manners. By that law the subject was considered only with reference to the burthens to be imposed upon a man, not as to the succession of his moveable property. In The Digest, Lib. 50, tit. 1, l. 6, s. 2, this is stated: "Viris prudentibus placuit duobus locis posse aliquem habere domicilium;" and the case is put of a divided residence, perfectly *in æquilibrio*; and they

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differed upon the effect of it. Labeo decided that the party had no domicile at all; others held, that he had several domiciles, Dig. lib. 50, tit. 1, l. 5. That shows how inapplicable everything in the Roman law is to the question as to the succession to the moveable property of the intestate. As to the law of France and Holland, certainly it is of great importance to consider what the law of modern Europe is, as nothing is to be found upon it in our law. It is very important that the same rule should prevail as to the succession. The definition of the domicile in the modern law of Europe is very plain and simple. In Vattel, B. 1, c. 19, s. 218, p. 103, it is thus described: a fixed residence with an intention of always staying there; or in French *l'intention se fixer*. The definition in Denisart is pretty much the same. It consists in the fact and the intention: actual residence, and the intention to establish himself in the place where he resides; and no habitation, however long, will do unless with that intention.

This case then naturally divides itself in two parts: 1st, the period prior to the death of the intestate's father; 2dly, what has taken place since. This case depends entirely upon the latter; but the original domicile has been very much insisted on for the purpose of throwing upon us the burthen of showing that domicile was abandoned. It is necessary for us to show Lord Somerville acquired another domicile; not that he had abandoned his first domicile; for that is *ipso facto* gone by the acquisition of the other; otherwise all the cases that have been referred to, which are very *frequent in the French law, of two [*774] habitations; one in the capital, the other in a Province of France, would have been decided in an instant. In the case of Mademoiselle De Clermont Santoignon, she certainly never abandoned her first domicile, but always went there in the summer; and the same observation applies to the case of the Marquis De St. Paterre; but the question was, whether there was not so much more continued residence in the capital that a new domicile was acquired, which put an end to the original one. When once it is established that the domicile depends upon the fact and intention of residence, frequently you must have recourse to the domicile of origin, as in the case of an infant; and that is the reason given for the position that the domicile may be in a country in which the party never was. That the domicile of origin is never to be resorted to, when any other can be found, appears in many writ-

ers. Houard's Dictionary of Norman Law, art. Domicil. The domicile of habitation is the only one to which we pay any regard. That scarcely any regard is paid to the other in our law appears from the very few cases, which are only four: the question as to what circumstances constitute a domicile not being at all considered in *Lashley v. Hogg*, 6 Bro. P. C. 577. The words of Lord THURLOW in the case of *Bruce v. Bruce* are printed in Mr. Ommaney's petition on the Douglas cause. His Lordship says, the origin is to be received but as one circumstance in evidence; but it is an erroneous proposition that the domicile is to be held to be, where the party drew his first breath, without something more; it is *prima facie* evidence, but may be rebutted. Mr. Bruce settled abroad, enjoyed the privileges of the place; he might mean to return when he had made his fortune, but can it be contended that his original domicile continued? Granting he meant to return, he meant to change his domicile; but had not done so at his death.

In Voet upon the Pandect, B. 5, tit. 1, s. 98, that very case of going to India *negotiorum ratione* is stated, and that a modern law was made upon the subject in Holland. It is said, that when Sir Charles Douglas quitted Scotland he had lost his domicile immediately; but it was never suggested in that case that he was domiciled in Russia or Holland; and it was said, that, when he came into the British service, he came as a Briton.

[*775] That must be recollected *with reference to the circumstances under which Lord Somerville quitted his country originally. Mr. Scott had nothing like an establishment in this country. He lived either in chambers or a small house. But I principally rely on *Lord Annandale's Case* to show, that the domicile of origin is hardly regarded in our law; for in that case particularly it ought to have had weight, if it ever had. A distinction is made in all the writers between the *domicilium originis* and *domicilium natiuitatis*. The latter is never the domicile, unless the other cannot be ascertained. The LORD CHANCELLOR would not decide the question as to the domicile of Marquis William, not considering the domicile of origin at all material. The residence of Marquis George with his mother in England had been relied upon, and there is some little allusion to it in the judgment; but Pothier, a writer of great authority, treating of the custom of Orleans in the first section of his introduction as to the Customs

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of France, is clear, that the domicile of a minor cannot be changed by the residence of the guardian. Lord Annandale was of a most unsettled disposition. His letters showed a dislike of all parts of this island. His habits were foreign. It seemed necessary there to settle the domicile of his father; but the LORD CHANCELLOR would not decide it, saying only, that it was not clear the domicile of Marquis William was not in England. Till the Union he came here only once, as a foreigner. He was violent against the Union, and never came to London to reside till long afterwards, when he was elected one of the Sixteen Peers. He had three houses in Scotland, and was attached to that country by many circumstances that cannot exist here; he had many hereditary jurisdictions, and some of the Dumfries boroughs. He had resided three years in England before the birth of the Marquis George, and had married a Dutch lady in England. It is true, he had brought furniture from Cragie Castle, as he might very easily do, by sea, but the circumstances were very slight to prove a change of domicile.

If the circumstance that seems to be relied on as dis- [776] tinguishing this case from that of Sir Charles Douglas, that Lord Somerville was the heir-apparent of the family, gives any additional weight to the domicile of origin, it is singular that it is not noticed in any of the cases. How can that distinction be material, considering the origin of the law of domicile? By the Roman law all the sons, till emancipated, were equally *fili familias*. What greater uncertainty can there possibly be than relying upon such a circumstance with a view to judge of a man's acts and intention to acquire a domicile in another place? Certainly the consideration of birth and the expectations he has in the country, where his father was settled, are not to be laid out of the case. Those are circumstances to be used to show where it was likely the son would wish to be domiciled; but when you have the fact of his residence and declarations of his mind, when you have ascertained what he did and said, it is not material to resort to what he would be likely to do and say. Lord Somerville's return to Scotland, in 1745, is to be accounted for by the state of the country at that period. The first thing he did was to join the army. During the eighteen years he was in the army he was not once in Scotland, except when his regiment was there. When he went there in 1763, and his father settled an annuity upon him, that was the only business upon which he then

went there. His next appearance there was, when he was sent for upon his father's illness; and his stay merely long enough to see him die. If Sir Charles Douglas quitting his country, and entering into a foreign service, changed his domicile, why did not Lord Somerville, entering into the British service? It is stated from the high authority of D'Aguesseau, that the reputed domicile

of every great Lord in France is at Paris; unless he has [* 777] in fact acquired one elsewhere. Lord Somerville *certainly had acquired none elsewhere. Serving his Majesty

as a Briton, not as a Scotchman, why was not the original domicile got rid of? If he had expectations in Scotland, had he not also in England? The estate in England was much larger.¹ But those circumstances ought not to have much weight in any case.

Then what passed after the death of the elder Lord Somerville? Immediately afterwards his son came to London. That was the moment in which it was most natural to decide, whether he meant to be a resident Scotchman or an Englishman. In his father's life there was a strong indication of a purpose not to reside in Scotland; for his father's dying request to him was to live there during part of the year. The house in Scotland was then used only as a summer country-house, as most convenient for him. It does not appear when he took the house in London. It is taken in the argument, and calculations are made upon that, as if it was only from 1778; but that is not a fair way of putting it. It was not in consequence of being elected one of the Sixteen Peers that he resided there. We find him appealing from the rates in 1773. That shows a probability that he had a lease at that time; for they reduced him then from £90 to £84 a-year, just as they did afterwards. In 1769 he was residing there. He was extremely anxious to purchase the remainder of the term. As to the nature of his establishment, the quantity of furniture, &c., these questions never can turn upon such circumstances. All the writers upon the subject agree that such circumstances are of no consequence, so that he has a permanent term in the house. Domat, Vol. ii. b. 1, tit. 16, s. 3, par. 5, says, it is the same, whether it is his own house or a hired one. It is manifest why Lord Somerville stated to his friends in London that he considered that house

¹ There was some difference in the statement as to this. The English estate was £1000 a year, the Scotch estate was stated to be now £2500 a-year. On the other side it was said to have been at that time only £600 a-year.

as a lodging house; a natural excuse for him to make, but we know it was not so, from the long term he took and the longer he wished to take. Next, as to his title-deeds: there is no evidence that they were in Scotland; but it is natural to suppose those of his Scotch estate were there.

The most important part of the case consists of the declarations of Lord Somerville, and the description of himself in the books of *the bank. Those circumstances are treated as [*778] slight, but they are considered most important by all the foreign lawyers, as superseding every other. Though the *Encyclopédie* is certainly not a book of authority, yet the rule as to what constitutes a domicile is distinctly laid down; and the authorities referred to. Pothier, *Treatise on the Custom of Orleans*, 10, speaks of it as the place where he describes himself as residing in public acts, or to which he goes with his family, in order to keep Easter; and he goes on to say, that only where these circumstances are not to be found, where there is no declaration upon the subject, where it is in perfect *æquilibrio*, you must have recourse to the original domicile. The expression *Un ménage* is not to be translated into English. In the case of *Mademoiselle De Clermont Santoignon*, cited from *Denisart*, Art. Domicil, No. 17, her change of residence was not alone sufficient to show that she had changed her domicile. The decision was upon the acts she had done, describing herself as domiciled in Mayenne. The case of the *Marquis De St. Paterre*, cited from *Cochin*, vol. v. p. 1, is much stronger; who in deeds, that he had executed from 1704 to 1714, described himself as residing in the city of Mans, but only lodging at Paris; from 1714 to 1720 he had described himself sometimes as residing in the one, and sometimes in the other. Being equal, therefore, in that respect, it is said no inference could be drawn. But there was nothing farther in favour of the domicile at Paris; and there were other circumstances, showing he considered himself as going to Paris from home. He kept a journal, entitled “*De mon voyage à Paris.*”

In the case of *Mons. De Courtaneon*, *Coch.* Vol. iii. 702, there was no decision, being referred in order to know how he described himself in his public acts. Another case in *Denisart*, Art. Domicil, No. 32, was decided entirely upon the party's description of himself. The case of the *Duchess of Hainhault*, *Coch.* Vol. ii., also turned entirely upon the same point. It was said there,

as here, the broker might give any description. It is very material in the case of a common man to describe himself uniformly. But in none of Lord Somerville's letters and papers has he described himself with reference to Scotland; and as all the papers are in the possession of those resisting the English domicile, it may be assumed, that no such description is to be found.

[779] Then as to his declarations: certainly, when coupled with the fact, they are very material; and here are three witnesses unimpeached. The conversation with Colonel Reading as to the consequence of his living so little among them shows, he thought they considered him as a foreigner. In summer Edinburgh is even more deserted than London. This shows his consciousness that he was not living as a Scotch nobleman. The evidence of what passed with Sir James Bland Burgess is also very material. It is also a very important consideration, that his residence in Scotland was universally only during the summer months. It is held by authors of great authority, that a country residence will not change the domicile. Bynkershoek, *Quest. Jur. Priv. b. 1, c. 16, 185*, states the case of a brewer at the Hague, who, having one son by a deceased wife, hired a house near Leyden for the purpose of acquiring the inheritance of the son by the law of that place. He took the house for three years, and carried to it part of his furniture; but at the Hague he had the whole of his establishment. The distribution was determined to be according to the law of the Hague, and the reason given is, that at Leyden he was residing at a country-house. That applies strictly to this case. Lord Somerville was residing at his Tusculanum, as Bynkershoek calls it, *colaptatis causa in astate*. It is impossible to ascribe his residence in London to any purpose but that of being a domiciled Englishman. The case referred to in D'Aguesseau of a residence of ten years being necessary to acquire a domicile in Brittany is quite out of the question. The reason given by Pothier is, that you can ascribe the residence to nothing but an intention to acquire a domicile. The inclination of the Court, in all the decisions that have taken place in this country, though it has not come to a rule, which is much to be lamented, has been to hold, that the domicile is in the capital of Great Britain, unless an intention to the contrary is shown. If with the strong circumstances, denoting Lord Somerville's intention to acquire a domicile in England, he should be held not to have a domicile in London,

the law will be left in a state of more uncertainty even than at present.

The Attorney-General in reply.

The MASTER OF THE ROLLS (Lord ALVANLEY): — [785]

This case has been extremely well argued on all sides; and I have the satisfaction of thinking, I have received every information that either industry or abilities could furnish. The question is simply as to the succession to the personal estate of the late Lord Somerville: It is in some respects new, so far as it is a question between two acknowledged domicils. In the late cases the question has been, whether the first domicil was abandoned, and where at the time of the death the sole domicil was; but here the question is, which of two acknowledged domicils shall preponderate; or rather, which is the domicil, according to which the succession to the personal estate shall be regulated? Questions upon the law of succession to personal estate have been very frequent of late in this country; and unless the Legislature interposes, which I sincerely hope they will, to assimilate the law of the whole island upon this subject, such questions may be expected very frequently to occur. In the course * of [*786] a few years there have been four cases in the House of Lords, and one in this Court. I have been favoured with the opinions delivered by Lords THURLOW and LOUGHBOROUGH; the former in *Bruce v. Bruce*; the latter in *Ommancy v. Bingham*, the case of Sir Charles Douglas. I have very fully considered all the cases and the opinions of those two learned Lords, and the authorities referred to in the printed cases, and also all the authorities referred to by the foreign jurists, which were very properly brought forward on this occasion. It is unnecessary to enter into a comment upon all these authorities. It will be sufficient to state the rules which I am warranted to say result, with the reasons for adopting them in this case.

The first rule is that laid down by those learned Lords, adopted in the House of Lords, and admitted in this argument to be the law, by which the succession to personal estate is now to be regulated: whatever might have been the opinion of the courts of Scotland, which certainly at one time took a different course. That rule is, that the succession to the personal estate of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death, without any regard

whatsoever to the place either of the birth or the death, or the situation of the property at that time. That is the clear result of the opinion of the House of Lords in all the cases I have alluded to, which have occurred within the few last years. This, I think, is not controverted by the counsel on either side; but it was said, that law could prevail, and be applied, only where such domicile can be ascertained, and that I admit.

The next rule is, that though a man may have two domicils for some purposes, he can have only one for the purpose of succession. That is laid down expressly in *Denisart* under the title *Domicil*; that only one domicile can be acknowledged for the purpose of regulating the succession to the personal estate. I have taken this as a maxim: and am warranted by the necessity of such a maxim; for the absurdity would be monstrous, if it were possible, that there should be a competition between two domicils as to the distribution of the personal estate. It could never possibly be determined by the casual death of the party at either. That would be most whimsical and capricious. It might depend upon the accident, whether he died in winter or summer, and many [* 787] * circumstances not in his choice, and that never could regulate so important a subject as the succession to his personal estate.

The third rule I shall extract is, that the original domicile, or, as it is called, the *forum originis*, or the domicile of origin, is to prevail, until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile. I speak of the domicile of origin rather than that of birth; for the mere accident of birth at any particular place cannot in any degree affect the domicile. I have found no authority or *dictum* that gives for the purpose of succession any effect to the place of birth. If the son of an Englishman is born upon a journey in foreign parts, his domicile would follow that of his father. The domicile of origin is that arising from a man's birth and connections.

To apply these rules to this case. It cannot be disputed, that Lord Somerville's father was a Scotchman. He married an English lady; returned to Scotland; repaired his family house, occupying another in the neighbourhood in the mean time; and he had apartments in Holyrood-House. For the first part of his life after his marriage he seems to have made Scotland almost his sole resi-

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dence; nor was it contended, that during that period he had acquired any other. The father being then without doubt a Scotchman, the son was born; and at the age of nine or ten was sent into England for education, and from thence to Caen in Normandy. It cannot be contended, nor do I think it was, that during the state of pupilage he could acquire any domicile of his own. I have no difficulty in laying down, that no domicile can be acquired, until the person is *sui juris*.¹ During his continuance in the military profession I have not heard it insisted, that he acquired any other domicile than he had before. Upon his father's death and his return to Scotland, a material fact occurs, upon which great stress was laid on both sides. It is said, his father's dying injunctions were, that he should not dissolve his connection with Scotland. In the subsequent part of his life he most religiously adhered to those injunctions. But it is said, that in conversation he manifested his preference of England; and that if it had not been for those injunctions of his father he would have quitted Scotland. Admit it. That in my opinion is the strongest argument in favour of Scotland: for, whether willingly or reluctantly, whether from piety or from *choice, it is enough [*788] to say, he determined to keep up his connection with that country; and the motive makes not the least difference.

Then see, how after his father's death he proceeded to establish himself in the world. From that time undoubtedly he was capable of establishing another domicile. Until that time there could be no doubt that the surplus of his personal estate must, if he had died, have been distributed according to the law of Scotland. Then, to trace him from that time. It appears, he had determined not to abandon his mansion-house: so far from it, he made overtures with a view to get apartments in Holyrood-House; from

¹ A domicile cannot be acquired by the act of the infant: but, with the exception of fraud, a domicile acquired by the surviving mother becomes the domicile of the infant. *Pottinger v. Wightman*, 3 Mer. 67.

See upon the subject of domicile the references in the note, 3 Ves. 203. In *Curling v. Thornton*, in the Prerogative Court of Canterbury, Michaelmas Term, 1823, published by Dr. Addams, in his Ecclesiastical Reports, vol. ii., page 6, an attempt to establish a domicile in a foreign

country against a will, made in this country, failed; the original domicile not being completely abandoned; if a British subject can adopt a foreign domicile to the extent of completely abandoning his British domicile; and if a change of domicile can have the effect, beyond an alteration of the succession in the event of an intestacy, to annul a will, according to the law of the original domicile: propositions, considered by the court (Sir J. NICHOLL) as not sustained by authority, and doubtful on principle.

which I conjecture, that, if that application had been granted, he might have been induced to spend more time than he did in Scotland. He came to London. I will not inquire how soon he took a permanent habitation there, but I admit, from that time he manifested an intention to reside a considerable part of the year in London, but also to keep up his establishment in Scotland, and to spend as nearly as possible half of the year in each. He took a lease of the house, evidently with the intention to have a house in London as long as he lived, with a manifest intention to divide his time between them. It is then said, there are clearly two domicils alternately in each country. Admit it: then the question will arise, whether in case of his death at either, that makes any difference. It was contended in favour of the English domicile, that in such a case as that of two domicils, and to neither any preference, for it cannot be contended that the domicile in Scotland was not at least equal to that in England, except the *lex loci rei sitæ* is to have effect, the death should decide. There is not a single *dictum* from which it can be supposed that the place of the death in such a case as that shall make any difference. Many cases are cited in Denisart to show that the death can have no effect; and not one, that that circumstance decides between two domicils. The question in those cases was, which of the two domicils was to regulate the succession; and without any regard to the place where he died. These cases seem to prove, and if necessary, I think, it may be collected, that those rules have prevailed in counties which, being divided into different provinces, frequently afford these questions. The fair inference from them is,

that, as a general proposition, where there are two con-
[* 789] temporary *domicils, this distinction takes place; that

a person not under an obligation of duty to live in the capital in a permanent manner, as a nobleman or gentleman, having a mansion-house, his residence in the country, and resorting to the metropolis for any particular purpose, or for the general purpose of residing in the metropolis, shall be considered domiciled in the country; on the other hand a merchant, whose business lies in the metropolis, shall be considered as having his domicile there, and not at his country residence. It is not necessary to enter into that distinction; though I should be inclined to concur in it. I therefore forbear entering into observations upon the cases of Mademoiselle De Clermont Santoignon and the Count

No. 3. — *Somerville v. Somerville*, 5 Ves. 789, 790.

De Choiseul, and the distinction as to the acts of the former, describing herself as of the place in the country.

The next consideration is, whether with reference to the property or conduct of Lord Somerville there is anything showing he considered himself as an Englishman. It was said, for the purpose of introducing the definition of the domicile in the Civil Law, "*Ubi quis Larem rerumque ac fortunarum suarum summam constituit*," that the bulk of his fortune was in England; and the description in the bank-books was relied on. I lay no stress whatsoever on that description in those books or in any other instrument; for he was of either place, and was most likely to make use of that to which the transaction in question referred. It was totally immaterial which description he used. It is hardly possible to contend, that money in the funds, however large, shall preponderate against his residence in the country and his family seat. It is hardly possible that should be so annexed to his person as to draw along with it this consequence. Upon nice distinctions I think it might be proved, that his principal domicile must be considered as in Scotland. Great stress, and more than I think was necessary, was laid upon the manner in which he passed his time in each place. There is no doubt the establishment in Scotland was much greater than that in London. In my opinion Byrker-shoek was very wise in not hazarding a definition. With respect to that to be found in the Civil Law, the words are very vague, and it is difficult to apply them. I am not under the necessity of making the application, for my opinion will not turn upon the point, which was the place where he kept the sum of his fortune. It is of no consequence whether more or less money was spent at the *one place or the other, living alternately in [* 790] both. Some time before his death he talked of making his will in Scotland. That circumstance is decisive that his death in England was merely casual, not from intention. The case then comes to this. A Scotchman by birth and extraction, domiciled in Scotland, takes a house in London; lives there half the year, having an establishment at his family estate in Scotland, and money in the funds, and happens to die in England. I have no difficulty in pronouncing, that he never ceased to be a Scotchman; his original domicile continued. It is consistent with all the authorities and cases, that, where a man has two domicils, the domicile he originally had shall be considered his

domicil for the purpose of succession to his personal estate, until that is abandoned and another taken.

It is surprising that questions of this sort have not arisen in this country, when we consider, that till a very late period, and even now for some purposes, a different succession prevails in the Province of York. 4 Burn's Ec. Law, 364. The custom is very analogous to the law of Scotland. Till a very late period the inhabitants of York were restrained from disposing of their property by testament. The alteration may account for the very few cases occurring; for very few persons of fortune die intestate, though it has happened in this case. Before that power of disposing by testament such cases must have been frequent; and the question then would have been, whether during the time the custom and the restraint of disposing by testament were in full force, a gentleman of the county of York, coming to London for the winter and dying there intestate, the disposition of his personal estate should be according to the custom or the general law. One should suppose it hardly possible that some such case had not occurred. I directed a search to be made in the Spiritual Court and the Court of Chancery, where it was most likely that such a case would be found; but I do not find that any such case has occurred. Some observations may arise upon that custom. It may be thought there are some inaccuracies in the words of the Statute, 4 Will. & Mary, c. 2. upon it. The custom, 2 Burn's Ec. Law, 750, as it is stated to have existed, is thus expressed: that there is due to the widow and to the lawful children of every man being an inhabitant or householder within the said Province of York, and dying there or elsewhere intestate, being an inhabi-

tant or householder within that province, a reasonable [*791] *part of his clear moveable goods: unless such child be

heir to his father deceased, or were advanced by his father in his lifetime, by which advancement it is to be understood that the father in his lifetime bestowed upon his child a competent portion whereon to live. I observe, the statute giving the power of disposing by testament, after reciting the custom, directs, that it shall be lawful for any person inhabiting or residing, or who shall have any goods or chattels within the Province of York, to give, bequeath, and dispose of all their goods, chattels, debts, and other personal estate. One would suppose from this, that the Legislature had some reference to the *lex loci rei sitæ*; and

No. 3. — *Somerville v. Somerville*, 5 Ves. 791, 792.

that it was supposed the custom would attach upon any property locally situated there, though the party was not resident; and though it is now too late to doubt the law upon that, I have some reason to think our Spiritual Courts inclined, as the courts of Scotland, to the *lex loci rei sitæ*: and if the question had occurred in the Court, and the authority of the House of Lords had not interfered, that would have been considered as the rule; and for this reason, — that their jurisdiction is founded upon it, the distribution arising from the place where the property is situated; and it is natural for the Judge, who acquired his authority from the situation of the property, to suppose the rule should be that of the place where the property is. But that now certainly is not the case.

I shall conclude with a few observations upon a question that might arise, and which I often suggested to the Bar. What would be the case upon two contemporary and equal domicils? if ever there can be such a case, I think such a case can hardly happen, but it is possible to suppose it. A man born, no one knows where, or having had a domicile that he has completely abandoned, might acquire in the same or different countries two domicils at the same instant, and occupy both under exactly the same circumstances, both country houses, for instance, bought at the same time. It can hardly be said that, of which he took possession first, is to prevail. Then, suppose he should die at one; shall the death have any effect? I think not, even in that case; and then *ex necessitate* the *lex loci rei sitæ* must prevail, for the country in which the property is would not let it go out of that until they know by what rule it is to be distributed. If it was in this country, they would not give it until it was proved that he had a domicile somewhere.

In these causes I am clearly of opinion Lord Somerville [792] was a Scotchman upon his birth, and continued so to the end of his days. He never ceased to be so, never having abandoned his Scotch domicile, or established another. The decree therefore must be, that the succession to his personal estate ought to be regulated according to the law of Scotland.

Bell v. Kennedy.¹

L. R. 1 H. L. Sc. 307-326.

[307]

Domicile of Birth or Origin.

PER LORD CHANCELLOR: The law is, beyond all doubt, clear with regard to the domicile of birth, that the personal *status* indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal *status* of another domicile is acquired.

PER LORD WESTBURY: The domicile of origin adheres until a new domicile is acquired.

PER LORD CHELMSFORD: The *onus* of proving a change of domicile is on the party who alleges it.

Mrs. Kennedy and her husband claimed from her father (Mr. Bell, the above appellant) her share of the parental "goods in communion," on the allegation that Mr. Bell, when his wife (Mrs. Kennedy's mother) died on the 28th of September, 1838, had acquired a Scotch domicile, and so had become subject to the Scotch law as to *communio bonorum inter conjuges*.²

Mr. Bell's defence was, that on the 28th of September, 1838, when his wife died, he had not acquired a Scotch domicile; for that he had then retained unchanged his domicile of origin in Jamaica, where he was born, where he married, and where communion of goods between husband and wife was unknown.

The second division of the Court of Session, affirming the interlocutor of Lord KINLOCH, decided that Mr. Bell, when his wife died, had become domiciled in Scotland, and, consequently, was liable to his daughter for her proportion of the "goods in communion."

The House of Lords disagreed with this ruling, and determined that on the day in question Mr. Bell's legal domicile was still in Jamaica, so that the question as to *communio bonorum* did not require examination.

[* 308] * Sir Roundell Palmer, Q. C., and Mr. Cotton, Q. C., were of counsel for the appellant.

Mr. Anderson, Q. C., and Mr. Mellish, Q. C., for the respondents.

¹ Reported 22 Dunlop, 269, and 3rd Series, Vol. i. p. 1127. & 19 Vict. c. 23, s. 6) which at the time of the death in question would have

² A rule relating to the division of property (since repealed by statute 18 applied to the property of the spouses, if the domicile had been Scotch.

The LORD CHANCELLOR (LORD CAIRNS) :—

My Lords, this appeal arises in an action commenced in the Court of Session, I regret to say so long ago as the year 1858, in the course of which action no less than sixteen interlocutors have been pronounced by the Court, all, or the greater part of which, become inoperative or immaterial if your Lordships should be unable to concur in the view taken by the Court below of the question of domicile.

The action is raised by Captain Kennedy, and his wife, the daughter of the late Mrs. Bell; and the defender is Mrs. Kennedy's father, the husband of Mrs. Bell. The claim is for the share, said to belong to Mrs. Kennedy, of the goods held in communion between Mr. and Mrs. Bell. This claim proceeds on the allegation that the domicile of Mrs. Bell, at the time of her death on the 28th of September, 1838, was in Scotland. And the question itself of her domicile at that time depends upon the further question, what was the domicile of her husband? Her husband, the appellant, is still living, and your Lordships have therefore to consider a case which seldom arises, the question, namely, of the domicile at a particular time of a person who is still living.

Mr. Bell was born in the island of Jamaica. His parents had come there from Scotland and had settled in the island. There appears to be no reason to doubt but that they were domiciled in Jamaica. His father owned and cultivated there an estate called the Woodstock estate. His mother died when the appellant was about the age of two years, and immediately after his mother's *death he was sent to Scotland for the purpose [*309] of nurture and education. By his father's relatives he was educated in Scotland at school, and he afterwards proceeded to college. His father appears to have died when he was about the age of ten years, dying, in fact, as he was coming over to Great Britain for his health, but with the intention of returning to Jamaica.

The appellant, after passing through college in Scotland, travelled upon the Continent; and soon after he attained the age of twenty-one years, he went out again to Jamaica, in the year 1823, with the intention of carrying on the cultivation of the Woodstock estate, which, in fact, was the only property he possessed. He cultivated this estate and made money to a considerable amount. He arrived at a position of some distinction in the island. He

was the custos of the parish of St. George, and was a member of the Legislative Assembly. He married his late wife, then Miss Hosack, in Jamaica, in the year 1828, and he had by her, in Jamaica, three children.

It appears to me to be beyond the possibility of doubt that the domicile of birth of Mr. Bell was in Jamaica, and that the domicile of his birth continued during the events which I have thus described.

In the year 1834 a change was made in the law with regard to slavery in the island of Jamaica, which introduced, in the first instance, a system of apprenticeship, maturing in the year 1838 into a complete emancipation. This change appears to have been looked upon by Mr. Bell with considerable disfavour, and, his health failing, in the year 1837, he determined to leave Jamaica, and to return to some part, at all events, of Great Britain. He entered into a contract for the sale of the Woodstock estate, the purchase-money being made payable by certain instalments; and in 1837 he left the island, to use his own expression, "for good." He abandoned his residence there without any intention at that time, at all events, of returning to the island. He reached London in the month of June, 1837. He remained in London for a short time, apparently about ten days, and he then went on to Edinburgh, and took up his abode under the roof of the mother of his wife, Mrs. Hosack, who at that time was living in Edinburgh.

I ought to have stated that while the appellant was in [*310] Jamaica *he appears to have kept up a correspondence with his relatives and friends in Scotland. In the year 1833 he acquired (I prefer to use the term "acquired" rather than the word "purchased") the estates of Glengabers and Craka. He appears to have taken to those estates mainly in settlement of a claim for some fortune or money of his wife secured upon them. It is apparent, however, that he had at no time any intention of residing upon Glengabers; and, in fact, the acquisition of those estates bears but little, in my opinion, upon the question of domicile, because in 1833, when he acquired them, his domicile, beyond all doubt, was, and for some years afterwards continued to be, in Jamaica.

He wrote occasionally at that time from Jamaica, evincing a desire to buy an estate at some future period in Scotland, if he could obtain one to his liking, and even an intention, if he could

obtain such an estate, of living in Scotland, but nothing definite appears to have been arranged or said upon the subject; and, in fact, at this time other suggestions as to other localities appear to have been occasionally entertained and considered by him.

In these letters he frequently uses an expression that was much insisted upon at the bar, — the expression of “coming home;” but I think it will be your Lordships’ opinion that the argument is not much advanced, one way or the other, by that expression. It appears to me to be obviously a form of language that would naturally be used by a colonist in Jamaica speaking of the mother country in contradistinction to the colony.

Up to this point, my Lords, there is really no dispute with regard to the facts of the case. The birth-domicil of the appellant in Jamaica continued, at all events, till 1837, and the onus lies upon those who desire to show that there was a change in this domicil, by which I mean the personal *status* indicated by that word, — the onus, I say, lies upon those who assert that the personal *status* thus acquired, and continued from the time of his birth, was changed, to prove that that change took place. The law is, beyond all doubt, clear with regard to the domicil of birth, that the personal *status* indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal *status* of another domicil is acquired.

* I do not think it will be necessary to examine the [*311] various definitions which have been given of the term “domicil.” The question which I will ask your Lordships to consider in the present case is, in substance, this: Whether the appellant, before the 28th of September, 1838, the day of the death of his wife, had determined to make, and had made Scotland his home, with the intention of establishing himself and his family there, and ending his days in that country? The onus, as I have said, is upon the respondents to establish this proposition.

I will ask your Lordships, in the first place, to look at the facts subsequent to the return of the appellant to Scotland, as to which there is no dispute, then at the character of the parol evidence which has been adduced and, finally, at a few passages in the correspondence which is in evidence.

As regards the facts which are admitted, they amount to this: The appellant lived under the roof of Mrs. Hosack from the time of his arrival in Edinburgh, in the year 1837, until the 1st

of June, 1838. He appears to have borne the whole, or the greater part of her housekeeping expenses during that time. He inquired for, and looked after, various estates, in the south of Scotland especially, and he indicated a preference for the estates of Blairston or Auchindraine, of Mollance, and of Enterkine. With regard to Blairston or Auchindraine, it does not appear, so far as I can discover, to have been actually offered to him for sale. With regard to Mollance, before he came to any determination as to it, it was sold to another person. With regard to Enterkine, at the time we are speaking of, the 1st of June, 1838, a negotiation had been going on by letters written between the appellant and those who were proposing to sell the estate, but the offer which he ultimately made for it had at that time been refused, and, on the 1st of June, 1838, there was no pending offer on his part for the property. Mrs. Bell, his wife, at this time was expecting her confinement. The house of his mother-in-law, in which they were sojourning, was not sufficiently commodious for their wants, and the appellant took for one year a furnished house in Ayrshire, called Trochrigg. He took it with no intention, apparently, of buying the estate, although it appears to have been for sale; but with the intention of living for a year in the house, and [* 312] he * hired servants for his accommodation. He removed to Trochrigg on the 1st of June, 1838, and while so sojourning there, Mrs. Bell died in her confinement on the 28th of September in that year.

It appears to me, beyond all doubt, that prior to this time the appellant had evinced a great and preponderating preference for Scotland as a place of residence. He felt and expressed a great desire to find an estate there with a residence upon it with which he would be satisfied. His wife appears to have been even more anxious for this than he himself was; and her mother and their friends appear to have been eager for the appellant to settle in Scotland. There is no doubt that, since the death of his wife, he actually has bought the estate which I have mentioned, the estate of Enterkine, and that his domicile is now in Scotland. All that, in my opinion, would not be enough to effect the acquisition of a Scotch domicile. There was, indeed, a strong probability up to the time of the death of his wife that he would ultimately find in Scotland an estate to his liking, and that he would settle there. But it appears to me to be equally clear that if, in the course of

No. 4. — Bell v. Kennedy, 1 H. L. Sc. 312, 313

his searches, a property more attractive or more eligible as an investment had been offered to him across the border, he might, without any alteration or change in the intention which he expressed or entertained, have acquired and purchased such estate and settled upon it, and thus have acquired an English domicile. In point of fact, he made more or less of general inquiry after estates in England; and a circumstance is told us by one of the witnesses, Mr. Telfer, which seems to me of great significance. Mr. Telfer says that his relations entertained great apprehension or dread that he would settle in England, — a state of feeling on their part totally inconsistent with the notion that he had, to their knowledge, at that time determined ultimately and finally to settle in Scotland.

These being the admitted facts, let me next turn to the character of the parol evidence in the case. As to the evidence of the members of the Hosaek family, and of the servants, very little is to be extracted from it in the shape of information upon which we can rely. They speak of what they considered and believed was the intention of the appellant; but as to anything he said or did, to which alone your Lordships could attend, they tell us nothing *beyond what we have from the letters. As to [*313] the evidence of the appellant himself, I am disposed to agree very much with what was said at the Bar, that it is to be accepted with very considerable reserve. An appellant has naturally, on an issue like the present, a very strong bias calculated to influence his mind, and he is, moreover, speaking of what was his intention some twenty-five years ago. I am bound, however, to say, and therein I concur with what was said by the Court of Session, that the evidence of the appellant appears to be fair and candid, and that certainly nothing is to be extracted from it which is favourable to the respondents as regards the onus of proof which they have to discharge.

I will now ask your Lordships to look at what to my mind appears the most satisfactory part of the case, namely, the correspondence contemporaneous with the events in the years 1837 and 1838. I do not propose to go through it at length, but I will ask you to consider simply certain principal epochs in the correspondence from which, as it appears to me, we derive considerable light as to the intentions of the appellant.

In the first place, I turn to a letter written by the appellant on

the 26th of September, 1837, three months after the appellant and his wife had come to Scotland. He is writing from Minto Street, Edinburgh, to his brother-in-law, Mr. William Hosack, in Jamaica, and he says: "I have not got rid of my complaint as yet, and still find difficulty in walking much, and was obliged to forego the pleasures of shooting, on which I had so much set my heart. This country is far too cold for a person not having the right use of his limbs. In fact I have been little taken with anything, and would go to Canada, Jamaica, or Australia, without hesitation. I enjoy the fresh butter and gooseberries." Of the latter — that is, of the gooseberries — he proceeds to state some evil consequences which he had suffered, and then he says: "Everything else is as good, or has an equivalent fully as good, in Jamaica. My mind is not made up as to the purchase of an estate. Land bears too high a value in proportion to other things in this country, owing to the members of the House of Commons and of Lords being all landowners, and having thereby received greater legislative protection. The reform voters begin to see this, and as soon as the character of the House of Commons changes [*314] enough (and it *is changing prodigiously) the value of land will come to its true value in the state. I have formed these views since I came home, and have lost in proportion my land-buying mania." Thus, having, as I have stated, a domicile by birth in Jamaica, and having come to this country with an indeterminate view as to what property he should become the purchaser of, writing three months afterwards, he says: "I have been little taken with anything, and would go to Canada, Jamaica, or Australia, without hesitation." Nothing can be more significant as to the absence of any determination in his mind to make Scotland his fixed home, and to spend the remainder of his days there.

I come to the 27th of December, 1837, when the appellant, again writing to the same brother-in-law in Jamaica, says: "As to the country, I like none of it. I have not purchased an estate, and not likely to do so. I had my guns repaired, bought a pointer, purchased the shooting of an estate for £10, have never been there, nor fired a shot anywhere else. Have had a fishing-rod in my hands only for two hours, and caught nothing. I bought a horse, and might as well have bought a bear. He bites so, it would have been as easy to handle the one as the other. I exchanged him for

No. 4. — Bell v. Kennedy, 1 H. L. Sc. 314, 315.

a mare, and, positively, I have sent her to enjoy herself in a farm straw yard, without ever having been once on her back, or even touched her in any way." Here, again, we find that so far from his expressing a liking for the country upon better acquaintance, he says he does not like it; and so far from a determination to purchase an estate in Scotland and end his days upon it, he says, "I have not purchased an estate, and am not likely to do so."

Passing over three months more, I come to a letter dated the 20th of March, 1838, by Mrs. Bell, the wife's expressions being even more significant than those of her husband; for it is obvious that she, of the two, was more inclined to settle in Scotland. She writes: "The extreme severity of the winter has put us a good deal out of conceit of Scotland; but independent of that, I don't find the satisfaction in it I anticipated. If circumstances permitted, I would not mind to return to Jamaica; though, I dare say, after being here a few years, I might not like it. This country is so gloomy, it is sadly depressing to the spirits, so unlike what one *has been used to in dear, lovely Jamaica. [*315] The vile pride and reserve of the people is here too great a source of annoyance. A man is not so much valued on the man-ness and education of a gentleman as on the rank of his great-grandfather, — that is to say, among a certain class. You will perceive from this we are still at Number 9. Bell has several properties in view, but is as undetermined about where we may settle as when he left Jamaica. Next week he goes to Ayrshire to look at an estate, and from thence to Galloway and Dumfriesshire. If we don't fix very soon we purpose taking a furnished house in the country for twelve months." Now, the whole of this passage, I think, is of considerable importance, but the last sentence I have read affords a key which may be useful in letting us into the design of the spouses in taking the furnished house of Trochraigue. The interpretation given by this letter is, that it was equivalent to saying that they had not at that time fixed upon a residence.

I pass on for two months more. The offer which in the interval he had made for Enterkine had been refused. The furnished house at Trochraigue had been taken. The appellant and his wife were upon the eve of taking possession of it on the 1st of June, 1838: and on the 28th of May, 1838, the appellant writes to his brother-in-law in Jamaica: "I have taken a country-house at Trochrigg." "I leave this for it on the 1st of June. It is situated two miles

from Girvan, which is twenty miles west of Ayr, on the sea coast. Therefore, for the next twelve months you can address to me Trochrigg, near Girvan, Ayrshire, Scotland. The offer which I wrote you I have made for Enterkine I received no answer to until sixteen days after, and then I got an answer stating they had a better offer. Of this I believe as much as I like, for I see it advertised again in the Saturday's paper. I do not know whether I shall make anything of this estate for the present, and I care not. It is still very cold, and if I do not make a purchase in the course of this year, I perhaps will take a trip next summer to the south of France, and see whether I don't find it warmer there." That is to say in the next summer which would be the summer of 1839, he was in expectation that Mrs. Bell and his family would be able to accompany him, to "take a trip to the south of France, and see whether he did not find it warmer there,"

[*316] *not, as it seems to me, for the purpose of enjoying a temporary sojourn, but, if he found it a more agreeable climate, for the purpose of making it his permanent residence.

There is only one other passage to which I would ask your Lordships' attention. It is in a letter written one month afterwards, while Mr. and Mrs. Bell were at Trochrigg, on the 16th of June. Writing to Mr. William Hosack, the appellant says: "There are several gentlemen's seats in the neighbourhood, but none of them reside in them. We will probably have only three or four acquaintances, and shall be, in that respect, much the same as in Jamaica. We must, however, make the most of it for twelve months, in the hope that during that time I may be able to find some estate that will be suitable for me as a purchase."

I find nothing after this material in the correspondence before the death of Mrs. Bell, and the last sentence I have read appears to me to sum up and to describe most accurately the position in which the appellant was at Trochrigg; he was there in the hope that, during the "twelve months," he might be able to find some estate which might be suitable to him for purchase; but upon that contingency, as it seems to me, depended the ultimate choice which he would make of Scotland, or some other country, as a place of residence. If his hope should be realized, we might from this letter easily infer that Scotland would become his home. If his hope should not be realized, I see nothing which would lead me to think, but everything which would lead me to doubt, that

he would have elected to remain in Scotland as his place of residence.

It appears to me on the whole, upon consideration of the facts which are admitted in the case, and the parol evidence, and the correspondence to which I have referred, that so far from the respondents having discharged the onus which lies upon them to prove the adoption of a Scotch domicile, they have entirely failed in discharging that burden of proof, and that the evidence leads quite in the opposite direction. There is nothing in it to show that the appellant's personal *status* of domicile as a native and an inhabitant of Jamaica has been changed on coming here by that which alone could change it, his assumption of domicile in another

*country. I am, therefore, unfortunately unable to advise [*317] you to concur in the opinion of the Court of Session. The

LORD ORDINARY entertained the opinion that the appellant, from the first moment of his arrival in Scotland, and of his sojourn at Mrs. Hosack's house, had acquired a Scotch domicile. But nothing could be more temporary — nothing more different from the state of things that would lead to the conclusion of the assumption of a Scotch domicile — than the circumstances under which that sojourn took place. Lord COWAN, in delivering the opinion of the Court of Session, appears, on the other hand, to have thought that the Scotch domicile was not acquired at the time of arrival in Scotland, but was acquired at the time of taking possession of Trochrigg. But if we are to put upon the occupation of Trochrigg the interpretation which the appellant himself put upon it at the time, so far from its being an assumption of a Scotch domicile, it appears to me to have borne an entirely different construction, and to have been a temporary place of sojourn, in order that a determination might be arrived at in the course of the sojourn, as to whether a Scotch domicile should or should not ultimately be acquired.

There is one passage in the judgment of the Court of Session, delivered by Lord COWAN, to which I must ask your Lordships more particularly to refer, for it appears to me to afford a key to what I think, with great respect, I must call the fallacious reasoning of the judgment. After speaking of the parol evidence given by the appellant, Lord COWAN uses these words: "For after all, what do the statements of the defender truly amount to? Simply this, that prior to September, 1838, he had not fixed on any place

of permanent residence, and had not finally made up his mind or formed any fixed intention to settle in Scotland before he bought Enterkine. There is no statement that he had it in his mind to take up his residence elsewhere than in Scotland." If, my Lords, I read these words correctly, Lord COWAN appears to have intimated that in his opinion it would not be enough to find that the appellant had not fixed on any place of permanent residence prior to September, 1838, and had not decidedly made up his mind or formed a fixed intention to settle in Scotland, unless proof were also adduced that he had it in his mind to take up his residence elsewhere than in Scotland. I venture to think that [*318] would be an *entirely fallacious mode of reasoning, and would be entirely shifting the position of the proof which has to be brought forward. The question, as it seems to me, is not whether he had made up his mind to take up his residence elsewhere than in Scotland, but the question is, had he, prior to September, 1838, finally made up his mind or formed a fixed intention to settle in Scotland. Lord COWAN appears to admit that the parol evidence itself would show that that had not been done, and that parol evidence is, in my mind, fortified and made very much more emphatic by the evidence of the correspondence to which I have referred.

I have humbly, therefore, to advise your Lordships to assoilzie the defender from the conclusions of the summons, and to reverse the sixteen interlocutors which have been pronounced by the Court below.

Lord CRANWORTH:—

The whole evidence has been so thoroughly examined by my noble and learned friend, that I feel that I should be rather wasting your Lordships' time if I were to attempt to go over again that which has been so completely exhausted by him.

That the appellant's domicile of origin was in Jamaica, and that it so continued till the month of April, 1837, is not and cannot be disputed. His residence there was interrupted for his education, partly in Scotland and partly on the Continent; but to Jamaica he returned immediately afterwards; there he married, and there he had his family; there he set up his *lares*, and there he continued till April, 1837, and would probably have continued much longer, but that his health had begun to fail. Then he returned to England — I say England — and it was really to England,

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because he landed at Dover; he passed a few days in London, and then went directly down to his mother-in-law's house in Edinburgh; but after residing, as he did temporarily, with her for about nine months, it is plain that he found that he was not quite so much pleased with the country to which he had returned as he expected to have been; and I think, therefore, that his inclinations were shaken upon this subject.

On the whole, my Lords, I entirely agree with the conclusion arrived at by my noble and learned friend.

* Lord CHELMSFORD:—

[* 319]

My Lords, I agree with my two noble and learned friends, that Mr. Bell had not acquired a domicile in Scotland at the time of his wife's death in September, 1838.

This case being one of an alleged change of domicile, it is necessary to bear in mind that a domicile, although intended to be abandoned, will continue until a new domicile is acquired. And that a new domicile is not acquired until there is not only a fixed intention of establishing a permanent residence in some other country, but until also this intention has been carried out by actual residence there.

It may be conceded that if the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile.

Mr. Bell's original domicile was Jamaica, and it is for the respondents, who rely upon a change of domicile, to prove that such change took place. The change of domicile (if any) must be dated subsequently to April, 1837, when Mr. Bell turned his back upon Jamaica, and apparently with the intention of never returning to the island. The learned counsel at one time seemed disposed to argue that Mr. Bell, having a fixed intention of making Scotland his future residence, the moment he quitted Jamaica with that view he acquired a Scotch domicile. But as intention alone is not sufficient to constitute domicile, this argument was not much insisted upon. It was contended, with more plausibility, that if Mr. Bell left Jamaica with the intention of never returning, but of purchasing land in Scotland, as soon as he arrived in Scotland and set about this intention he acquired a domicile. I do not think, however, that there is sufficient proof of a fixed intention on the part of Mr. Bell to purchase an estate in Scotland, and not elsewhere, with a view to a permanent residence, until he became

the purchaser of Enterkine, which was after the period when the respondent's case requires that the domicile should be established. He was certainly upon the look-out (if I may use the expression) for a place in Scotland, and would no doubt have closed with any advantageous offer. But it seems to me to be equally clear that he was not so wedded to the idea of a residence in Scotland as that if anything more eligible had presented itself in England he [*320] * would not have embraced it. To use his own expression upon his examination in the cause, he had "no fixed intention as to what he was to do for the future."

I think the respondents have failed to prove Mr. Bell's intention to acquire a new domicile before the death of his wife on the 28th of September, 1838; and therefore that the interlocutor finding that he became domiciled in Scotland at this date ought to be reversed.

Lord WESTBURY:—

My Lords I have very few words to add to what has been already stated to your Lordships; and, perhaps, even those are not quite necessary.

What appears to me to be the erroneous conclusion at which the Court of Session arrived is in great part due to the circumstance, frequently lost sight of, that the domicile of origin adheres until a new domicile is acquired. In the argument, and in the judgments, we find constantly the phrase used that he had abandoned his native domicile. That domicile appears to have been regarded as if it had been lost by the abandonment of his residence in Jamaica. Now, residence and domicile are two perfectly distinct things. It is necessary in the administration of the law that the idea of domicile should exist, and that the fact of domicile should be ascertained, in order to determine which of two municipal laws may be invoked for the purpose of regulating the rights of parties. We know very well that succession and distribution depend upon the law of the domicile. Domicile, therefore, is an idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile, and that domicile remains his fixed attribute until a new and different attribute usurps its place. Now this case was argued at the bar on the footing, that as soon as Mr. Bell left Jamaica he had a settled and fixed intention of taking up his residence in Scotland. And if, indeed, that had been ascertained

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as a fact, then you would have had the *animus* of the party clearly demonstrated, and the *factum*, which alone would remain to be proved, would in fact be proved, or, at least, would result immediately upon his arrival in Scotland.

*The true inquiry, therefore, is, — Had he this settled [*321] purpose, the moment he left Jamaica, or in course of the voyage, of taking up a fixed and settled abode in Scotland? Undoubtedly, part of the evidence is the external act of the party; but the only external act we have here is the going down with his wife to Edinburgh, the most natural thing in the world, to visit his wife's relations. We find him residing in Scotland from that time; but with what *animus* or intention his residence continued there we have yet to ascertain. For although residence may be some small *prima facie* proof of domicile, it is by no means to be inferred from the fact of residence that domicile results, even although you do not find that the party had any other residence in existence or in contemplation.

I take it that Mr. Bell may be more properly described by words which occur in the Digest; that when he left Jamaica he might be described as *quærens quo se conferat atque ubi constituat domicilium*, Dig. lib. 50, t. 1, 27. Where he was to fix his habitation was to him at that time a thing perfectly unresolved; and, as appears from the letters which your Lordships have heard, that irresolution, that want of settled fixity of purpose, certainly continued down to the time when he actually became the purchaser of Enterkine. But the *punctum temporis* to which our inquiries are to be directed as to Mr. Bell's intention is of an earlier date than that. The question is, had he any settled fixed intention of being permanently resident in Scotland on the 28th of September, 1838? I quite agree with an observation which was made in the Court of Session, that the letters are the best evidence in the case. To those letters your Lordships' attention has been directed, and whether you refer to the language of the wife's letters, or look exclusively at the language of the husband's letters written to his familiar friends or his relatives whom he had left in Jamaica, it is impossible to predicate of him that he was a man who had a fixed and settled purpose to make Scotland his future place of residence, to set up his tabernacle there, to make it his future home. And unless you are able to show that with perfect clearness and satisfaction to yourselves, it follows that the domicile of origin continues. And

therefore I think we can have no hesitation in answering the question where he was settled on the 28th of September. [* 322] It must * be answered in this way: he was resident in Scotland, but without the *animus manendi*, and therefore he still retained his domicile of origin.

My Lords, it is matter of deep regret, that although it might have been easily seen from the commencement of this cause that it turned entirely upon this particular question, yet we find that ten years of litigation have taken place, with enormous expense, and an enormous amount of attention to a variety of other matters, which would have been wholly unnecessary if judicial attention had been concentrated upon this question, which alone was sufficient for the decision of the case.

Lord COLONSAY:—

My Lords, while I do not differ from the judgment proposed, I cannot say that the case has appeared to me to be so very clear and free from difficulty as it has appeared to my noble and learned friends. I think it is a case of nicety on the evidence. But having gone over that evidence more than once with much care, and having listened to the whole of the able argument for the respondents, I do not see any sufficient ground for rejecting the conclusion at which my noble and learned friends have arrived.

The principle of domicile is one which occupies a very prominent place in our law, and in the law of all civilized countries. It exercises an influence almost paramount in regard to personal *status* and rights of succession, as well as to political international relations. It has therefore necessarily undergone much discussion in all countries, and both in ancient and modern times. Yet there is, perhaps, no chapter in law that has from such extensive discussion received less of satisfactory settlement. That is no doubt attributable, in no small degree, to the nature of the subject, involving, as it does, inquiry into the *animus* of persons who have either died without leaving any clear record of their intentions, but allowing them to be collected, by inference, from acts often equivocal; or who, being alive and interested, have a natural, though, it may be, an unconscious, tendency to give to their bygone feelings a tone and colour suggested by their present inclinations.

I am not disposed to take the evidence of Mr. Bell as the corner-stone of my judgment. I agree with the respondents in

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* thinking that what Mr. Bell wrote at the time, and what [* 323] he did at the time, are better materials and safer grounds for judgment than what he says now. And I should have been of that opinion even if his evidence had been less open to criticism, and less vulnerable than it is.

The case presents itself to my mind in this light. Mr. Bell's domicile was in Jamaica—not only his domicile by residence and property, and as being the seat of his mercantile pursuits and all his worldly interests, but also his domicile of origin. To this last I attach considerable importance, though I think that the measure of its importance on the question of evidence may be, and in this case is, modified by other considerations,—such as the previous history of his family, and of his wife's family, and his own early associations by residence in Scotland for twenty years from childhood until manhood. Still I think the circumstance that Jamaica was the domicile of origin is not unimportant in this case, and especially on the question as to the extinction of that domicile.

Then I think it is very clear that Mr. Bell left Jamaica with the intention of never returning, or, as it is expressed in some of the letters, he left it “for good.” I further think that his leading desire at that time, and for some time previously, was to acquire a land estate in Scotland, which would give him a desirable residence, and be at the same time a good investment for his money. This last was, I think, a *desideratum*, for it appears that he intended to invest in that way the whole, or nearly the whole, of his fortune, and was even disposed to borrow £14,000 or £15,000 to enable him to make such a purchase as he desired. But I do not think that his having sailed from Jamaica with that intent extinguished his Jamaica domicile. I know of no authority for that proposition. There are *dicta* to the effect that if Scotland had been the domicile of origin, and he had bid a final adieu to Jamaica and sailed for Scotland, and had died *in itinere*, the domicile of origin would be held to have revived; but there is no authority for saying that a person dying *in transitu* from the domicile of origin to a foreign land, had lost the domicile of origin. He could not so displace the effect which law gives to the domicile of origin, and which continues to attach until a new domicile is acquired *animo et facto*. He cannot have acquired a domicile in a new country which he has never reached.

[*324] *But Mr. Bell did reach Scotland, — and there the difficulty of this case begins. His leading desire was to find in Scotland an estate such as he would be disposed to invest his fortune in. He arrived in Scotland in June or July, 1837. He immediately set about prosecuting inquiries as to estates, chiefly in Ayrshire, Dumfriesshire, and Galloway. Among these was the estate of Enterkine. For that estate he made an offer in 1838, which was refused. He made a higher offer in 1839, which was accepted. I have no doubt that from the date of that purchase he was to be regarded as a domiciled Scotchman. The leading desire with which he left Jamaica and arrived in Scotland, and which during two years' residence in Scotland he still entertained, had now been realized. He had found a property such as he had desired, with a mansion that suited him. He invested his fortune in that purchase, and took up his abode in that mansion, — and he and his whole interest thus became, as it were, identified with that estate and rooted in the soil. The question here, however, is whether in September of the preceding year he had acquired a Scotch domicile.

To that question an affirmative answer was given by all the five learned Judges who considered the case in the Court below. A negative answer has been given by all my noble and learned friends who have now addressed the House. In these circumstances, and it being very much of a jury question, I may be excused for regarding it as a question of some difficulty.

The argument of the respondents that Mr. Bell, having quitted Jamaica for good, and gone to Scotland, where he had many attractions, with the avowed intention of investing his fortune in land in Scotland, and having indicated no disposition to make any other investment, his Scotch domicile must be held to have commenced from the time he arrived in Scotland and set about the prosecution and realization of that object, although in the mean time, while prosecuting his inquiries, he provided himself with a temporary habitation, was very forcibly put, and under certain supposable circumstances might be entitled to the greatest weight. I do not think that the acquisition of a permanent habitation by purchase or lease is necessary to domicile, neither do I attach importance to the circumstance that his inquiries or views were not always directed to the same estate, or to estates in the same country.

[*325] If it was clear that *prior to September, 1838, there was

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a fixed determination to invest his fortune in land in Scotland, and to reside there, I think that there was enough of actual residence to support the case of the respondents. But I think that while he had a strong desire to invest in land in Scotland with a suitable mansion on it, the fulfilment of that desire was contingent on his finding an estate that would give him not only a suitable residence, but also an adequate return for his money. This was indispensable, because his whole fortune was to be invested. Such an investment is not always, or easily, to be got, and it is to me by no means clear that if he had not been able within a short time to obtain such an investment he would have remained in Scotland. Looking to what appears to have been the state of his health, and the opinions expressed as to the climate, it seems not at all unlikely that in that event he would have lived chiefly in a warmer climate, and perhaps occasionally visited his friends in Scotland. He might, or might not, have invested in land elsewhere. But I do not see sufficient ground for holding that he had resolved to make Scotland the country of his residence, except in the event of his being able to make such an investment as he desired. In the mean time his mind was unsettled as to where he should finally cast anchor. His location in Scotland was tentative.

If his final offer for Enterkine, in the spring of 1839, had been rejected, I see no reason to conclude that he would have remained in Scotland; and if he had then gone to a preferable climate and taken up his residence there, I think it could not have been held that he had in the previous September become a domiciled Scotchman. If he had gone to Scotland with intent to reside permanently there, without regard to any particular mode of investing his fortune, the contingency on which, I think, so much depends, would have been out of the case, and his location in Scotland would not have been attributable to that purpose of investigation previous to decision to which I think it may fairly be attributed. No doubt, the continuance of the residence of a person in any country, however long he has been there, may, in a sense, be said to be contingent on possible future occurrences. But that has no resemblance to the present case, for here the purpose to settle *in a particular country, and so acquiring a domicil there, was contingent, and, as I think, in suspense. [*326]

Upon these grounds I am disposed to concur in the judgment proposed.

Other defences were pleaded in the action and were maintained in the Court below, and as the learned Judges in that Court were of opinion that the Scotch domicile had been established, it was proper, and, indeed, quite necessary, for them to deal with those other defences, and it would equally have been our duty to have done so if we had taken the same view as they did of the import of the evidence in regard to domicile; but in consequence of our having taken a different view of the import of that evidence, it has now become unnecessary to deal with those other defences.

Interlocutors reversed.

Udny v. Udny.

L. R., 1 H. L. Sc. 441-461.

[441] *Political and Civil Status. — Allegiance distinguished from Domicil. — Domicil of Origin and Choice distinguished. — Legitimation per subsequens matrimonium.*

Every individual at his birth becomes the subject of some particular country by the tie of natural allegiance, which fixes his political *status*; and becomes subject to the law of the domicile, which determines his civil *status*.

Per Lord WESTBURY: To suppose that for a change of domicile there must be a change of natural allegiance is to confound the political and the civil *status*, and to destroy the distinction between *patria* and *domicilium*.

Per The LORD CHANCELLOR (Lord HATHERLEY): A man may change his domicile as often as he pleases, but not his allegiance. *Exuere patriam* is beyond his power. *Dictum* of Lord KINGSDOWN in *Moorhouse v. Lord* (10 H. L. C. 272), qualified.

Per Lord WESTBURY: It is a settled principle that no man shall be without a domicile; and to secure this end the law attributes to every individual as soon as he is born the domicile of his father if the child be legitimate, and the domicile of his mother if the child be illegitimate. This is called the domicile of origin, and is involuntary. It is the creation of law, — not of the party. It may be extinguished by act of law, as, for example, by sentence or death or exile for life, which puts an end to the *status civilis* of the criminal; but it cannot be destroyed by the will and act of the party.

Domicile of choice is the creation of the party. When a domicile of choice is acquired the domicile of origin is in abeyance: but is not absolutely extinguished or obliterated.

When a domicile of choice is abandoned, the domicile of origin revives, — a special intention to revert to it being unnecessary.

Per Lord CHELMSFORD: Story says that the moment a foreign domicile is abandoned, the native domicile is re-acquired. The word “re-acquired” is an inaccurate expression. The meaning is, that the abandonment of an acquired domicile *ipso facto* restores the domicile of origin.

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If after having acquired a domicile of choice a man abandons it and travels in search of another domicile of choice, the domicile of origin comes instantly into action and continues until a second domicile of choice has been acquired.

Per Lord WESTBURY: A natural-born Englishman may domicile himself in Holland; but if he breaks up his establishment there and quits Holland, declaring that he will never return, it is absurd to suppose that his Dutch domicile clings to him until he has set up his tabernacle elsewhere.

* Per The Lord CHANCELLOR: The *status* of the child, with respect [*442] to its capacity to be legitimated by the subsequent marriage of its parents, depends wholly on the *status* of the putative father, not on that of the mother.

According to English law — where at the time of a bastard's birth the father has his domicile in England — no subsequent change of domicile can render practicable the bastard's legitimation.

The late Colonel John Robert Fullerton Udny, of Udny, in the county of Aberdeen, though born at Leghorn, where his father was consul, had by paternity his domicile in Scotland. At the age of fifteen, in the year 1794, he was sent to Edinburgh, where he remained for three years. In 1797 he became an officer in the Guards. In 1802 he succeeded to the family estate. In 1812 he married Miss Emily Fitzhugh, — retired from the army, — and took upon lease a house in London, where he resided for thirty-two years, paying occasional visits to Aberdeenshire.

In 1844, having got into pecuniary difficulties, he broke up his establishment in London and repaired to Boulogne, where he remained for nine years, occasionally, as before, visiting Scotland. In 1846 his wife died, leaving the only child of her marriage, a son, who, in 1859, died a bachelor.

Some time after the death of his wife, Colonel Udny formed at Boulogne a connection with Miss Ann Allat, which resulted in the birth at Camberwell, in Surrey, on the 9th of May, 1853, of a son, the above respondent, whose parents were undoubtedly unmarried when he came into the world. They were, however, united afterwards in holy matrimony at Ormiston, in Scotland, on the 2nd of January, 1854, and the question was whether the respondent, under the circumstances of the case, had become legitimate *per subsequens matrimonium*.

The Court of Session (first division) on the 14th of December, 1866 (3rd series, vol. v. p. 164), decided that Colonel Udny's domicile of origin was Scotch, and that he had never altered or lost it, notwithstanding his long absences from Scotland. They therefore found that his son, the respondent, "though illegitimate at

his birth, was legitimated by the subsequent marriage of his parents. Hence this appeal, which the House regarded as involving questions of greatly more than ordinary importance.

[* 443] * The appellant argued his own case.

Sir Roundell Palmer, Q. C., Mr. Mellish, Q. C., Mr. Fraser and Mr. Bristow, appeared for the respondent.

The following opinions of the Law Peers fully state the facts, the authorities, and the legal reasoning.

The LORD CHANCELLOR: —

My Lords, — In this case the appellant prays a judicial declaration that the respondent is a bastard, and is not entitled to succeed to the entailed estates of Udny, in Aberdeenshire.

The question depends upon what shall be determined to have been the domicile of the respondent's father, the late Colonel Udny, at the time of his birth, — at the time of the respondent's birth, — and at the time of the Colonel's marriage with the respondent's mother.

The appellant, who argued his case in person with very considerable ability, contended: First: That the domicile of origin of Colonel Udny was English. Secondly: That even if that were not so, yet that at the time of his first marriage, in 1812, he had abandoned Scotland for England, sold his commission in the army, took a house on lease for a long term in London, and resided there till he left England for France in 1844, for the purpose of avoiding his creditors; and that having thus acquired an English domicile, he retained it, and never re-acquired his Scotch domicile. Thirdly: That, at all events, if he did recover his Scotch domicile, yet it was not recovered at the date of the respondent's birth in May, 1853, nor even at the date of the intermarriage of the respondent's parents in January, 1854.

As regards the first question, your Lordships did not hear the respondents. You were satisfied that Colonel Udny's father, the consul, had never abandoned his Scottish domicile. Consequently you held that Colonel Udny's own domicile of origin was clearly Scotch, that having been the domicile of his father at the Colonel's birth.

A more difficult inquiry arose as to the domicile of Colonel Udny at the date of the respondent's birth in May, 1853.

[* 444] * Colonel Udny appears to have left the army about the same time that he married his first wife, viz., in 1812,

when he executed a contract and other instruments connected with his marriage, containing provisions referable to Scottish law, and describing himself as of Udny, in the county of Aberdeen. He, on his marriage, however, took a long lease of a house in London, in which he resided till 1844. He made frequent visits to Scotland, but had no residence there. He at one time contemplated restoring Udny Castle — and even three years after he had commenced his residence in London, appears to have still thought it possible that he might complete the restoration — and plans were about that time submitted to him for that purpose. For many years, however, he seems to have abandoned all hope of so doing, owing to his means being insufficient. He was appointed a magistrate in Scotland, but appears not to have acted as such. When in Scotland he usually resided with friends, but occasionally at hotels in the neighbourhood of his property; and he continually received detailed accounts of the estates, and took much interest in their management. His choice of England as a residence appears to have been considerably influenced by his taste for the sports of the turf. By his first marriage he had a son, John Augustus Udny.

The JUDGE ORDINARY and the Court of Session concurred in opinion that the long and habitual residence in England was not sufficient to amount to an abandonment of the Colonel's Scottish domicile of origin. This point, I confess, appears to me to be one of great nicety. I am not prepared to say that I am satisfied with that conclusion; but neither should I be prepared, without further consideration, to recommend to your Lordships a reversal of the judgment appealed from on the ground that the opinions of the Court below upon this point were erroneous.

Owing to this action having been raised in the Colonel's lifetime, the Court below had the advantage of the testimony of Colonel Udny himself, a circumstance which does not often occur in questions of domicile. It appears to have been very candidly given, and (as was observed by the LORD ORDINARY) by no means overstates the case in favour of the continuance of his Scottish domicile.

Several other witnesses were examined, who do not carry the case further. But, be this as it may, the events in the Colonel's * life, subsequent to 1844, appear to me to be [*445] those upon which the question of his domicile at the birth of the respondent really depends.

In 1844, the Colonel, after having been involved for some time in pecuniary difficulties (owing chiefly to his connection with the turf), was compelled to leave England, in order to avoid his creditors. He at first thought of taking some house "in the country," by which I think he meant in the rural parts of England; but afterwards the pressure of creditors became too great to admit of his so doing, and he appears, in the autumn, to have visited Scotland, where correspondence took place between himself and his agent as to arranging a trust deed by which Colonel Udny and his son, John Augustus, were to make provision, as far as possible, for the payment of their debts. On the 2nd of October he writes to his agent, mentioning that a creditor is pressing for immediate payment of £1200: "So let there be no time lost." And by a letter of his son of the 4th of November, 1844, it appears that his father had left England for Calais on the previous day. He about this time sold the lease of the London house in which he had so long resided. He sold also (as he himself states in his evidence) all his furniture and "everything that was in the house, including what had belonged to his mother, his sister, and his first wife." He went from Calais to Boulogne, and there resided in a hired house till 1853. He says in his evidence:—

"When I went to Boulogne I had no further connection with London. I had a married sister living there, and various other relations. During the nine years when my headquarters were at Boulogne I never resided in London. The time that I came over for my wife's confinement, in 1853, was the first time that I had visited London after leaving it for Boulogne. I remained there at that time only about a couple of days, and returned to Boulogne. While I was at Boulogne, I came over more than once to Scotland to visit my property. These were not long visits, but I did make them."

The wife alluded to in the above statement is the mother of the respondent. The Colonel's first wife did not go with him to Boulogne, but she joined him for a short time in 1845, leaving him afterwards on account of ill-health, and residing with his brother in London. She died in 1846.

The Colonel at Boulogne formed an illicit connection with the mother of the respondent, and in May, 1853, came to
*446] England *in consequence of a wish that she should be attended in her confinement by an English accoucheur;

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and on the 9th of May, 1853, the respondent was born at Camberwell. The Colonel appears to have returned almost immediately to Boulogne. He had been living on a very scanty allowance — his eldest son, too, was embarrassed — and at a very early period after the birth of the respondent the father and son appear to have thought that the birth of this child might facilitate the barring of the entail of the Scotch estates; for in a letter of the 29th of May, 1853, the Colonel writes to his son: “I shall be glad to hear of your interview with Mr. Skinner” (their legal adviser). “I think the great difficulty will be the uncertainty of the child’s life; however you will talk over all these matters with him.”

The Colonel was advised that by marrying the respondent’s mother he might, according to the law of Scotland, render the respondent legitimate, and that then the concurrence of the appellant in barring the entail would not be requisite. The advice on this latter point was erroneous; but it is enough to say that the Colonel came over to Scotland in November, 1853, clearly with the intent to celebrate a marriage with the respondent’s mother, and with the hope of raising money for the benefit of his elder son and himself by getting rid of the entail. He was under an impression that his English creditors could not molest him whilst in Scotland. He was much mortified afterwards to find that this was not the case, and wrote several letters to his son and others expressive of his disgust at having been hurried away from Boulogne, and his dislike to residing in Scotland. But I cannot bring my mind to doubt that his intention in returning to Scotland was to do that which he accomplished, — namely, to marry, in regular form, the respondent’s mother, and for that purpose to be domiciled there.

In his letter of the 9th of July, 1859, he expressly asserts it to have been his intention, in 1853, to be permanently domiciled in Scotland; but that letter may be open to the objection that it was written very shortly *ante litem motam*. I do not think that we can safely rely on the deed of disposition by his elder son of the 2nd of December, 1853, which recites “that the Colonel had made arrangements to return again to and to remain in Scotland,” because the father was not a party to that instrument. But, on the other hand, though the *recital itself may [*447] not be evidence, yet the Colonel took advantage of that instrument. And the whole course of the arrangements made

shows that the Colonel's intent, for which alone he came to Scotland, was by his marriage to make the respondent legitimate, and by means of that legitimation to deal with the estates. These objects required a Scottish domicile; and it would be singular to hold that he having, in fact, married on the 2nd of January, 1854, and resided in Scotland thenceforth to his death in 1861 (after the raising of the present action), the domicile must not be taken to have been Scottish, as it ought to be, for the purposes he had in view from the time of his return in 1853. It is true that the death of his elder son in the interval between the marriage and death of the Colonel, and the consequent falling in of the policies of insurance on his life, placed the Colonel to a certain degree in an easier position, and removed his apprehension of difficulty from his creditors: but I think his possible intention to leave Scotland (if molested by creditors) in no way disproves the existence of a resolution to remain, as he did, in that country (if allowed so to do) as his chosen and settled abode.

It seems therefore clear to me that the Colonel was, at the time of his marriage, domiciled in Scotland; but the question remains as to what was his domicile in May, 1853, at the time of the respondent's birth.

If he were domiciled in England up to 1844, and retained an English domicile up to and after May, 1853, then the question would arise, which has not been determined in any case by the Scottish courts, whether the child, being illegitimate at its birth, and its putative father not having at that time a power of legitimating him by means of a subsequent marriage with his mother, could be legitimated by his putative father subsequently acquiring a Scottish domicile before marriage with the mother.

I have myself held, and so have other Judges in the English Courts, that according to the law of England, a bastard child whose putative father was English at its birth could not be legitimated by the father afterwards acquiring a foreign domicile and marrying the mother in a country by the law of which a subsequent marriage would have legitimated the child. I see no reason to retract that opinion. The *status* of the child — with respect to its [*448] capacity to be legitimated by the subsequent marriage of its parents — depends wholly on the *status* of the putative father, not on that of the mother. If the putative father have an English domicile the English law does not, at the birth

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of the child, take notice of the putative father's existence. But if his domicile be Scottish, or of any other country allowing legitimation, though the mother be English at the birth, the putative father (as in *Munro v. Munro*, 7 Cl. & F. 842) is capable of legitimating the child. The foreign law, though deeming the child to be *filius nullius* at birth, yet recognises the father as such at the moment of his acknowledging the child, either by marriage and formal recognition, as in France, or by marriage only, as in Scotland. I do not think that the English law can recognise a capacity in any Englishman, by a change of domicile, to cause his paternity and consequent power of legitimation to be recognised. But however this may be, the question does not, in my judgment, here arise.

I am of opinion that the English domicile of Colonel Udny, if it were ever acquired, was formally and completely abandoned in 1844 when he sold his house and broke up his English establishment with the intention not to return. And, indeed, his return to that country was barred against him by the continued threat of process by his creditors. I think that on such abandonment his domicile of origin revived. It is clear that by our law a man must have some domicile, and must have a single domicile. It is clear, on the evidence, that the Colonel did not contemplate residing in France, — and indeed, that has scarcely been contended for by the appellant. But the appellant contends that when once a new domicile is acquired, the domicile of origin is obliterated, and cannot be re-acquired more readily or by any other means than those by which the first change of the original domicile is brought about, — namely, *animo et facto*. He relied for this proposition on the decision in *Munroe v. Douglas*, 5 Madd. 379, where Sir JOHN LEACH certainly held that a Scotsman, having acquired an Anglo-Indian domicile, and having finally quitted India, but not yet having settled elsewhere, did not re-acquire his original domicile; saying expressly, "I can find no difference in principle between an original domicile and an acquired domicile." That he acquired no new *domicil may be conceded, but it appears [*449] to me that sufficient weight was not given to the effect of the domicile of origin, and that there is a very substantial difference in principle between an original and an acquired domicile. I shall not add to the many ineffectual attempts to define domicile. But the domicile of origin is a matter wholly irrespective of any

animus on the part of its subject. He acquires a certain *status civilis*, as one of your Lordships has designated it, which subjects him and his property to the municipal jurisdiction of a country which he may never even have seen, and in which he may never reside during the whole course of his life, his domicile being simply determined by that of his father. A change of that domicile can only be effected *animo et facto*, — that is to say, by the choice of another domicile, evidenced by residence within the territorial limits to which the jurisdiction of the new domicile extends. He, in making this change, does an act which is more nearly designated by the word “settling” than by any one word in our language. Thus we speak of a colonist settling in Canada or Australia, or of a Scotsman settling in England, and the word is frequently used as expressive of the act of change of domicile in the various judgments pronounced by our Courts. But this settlement *animo et facto* by which the new domicile is acquired is, of course, susceptible of abandonment if the intention be evidenced by facts as decisive as those which evidenced its acquirement.

It is said by Sir JOHN LEACH, that the change of the newly-acquired domicile can only be evidenced by an actual settling elsewhere, or (which is, however, a remarkable qualification) by the subject of the change dying *in itinere* when about to settle himself elsewhere. But the dying *in itinere* to a wholly new domicile would not, I apprehend, change a domicile of origin if the intended new domicile were never reached. So that at once a distinction is admitted between what is necessary to re-acquire the original domicile and the acquiring of a third domicile. Indeed, the admission of Sir JOHN LEACH seems to have been founded on the actual decision of the case of *Colville v. Saunders*, cited in full in *Munroe v. Douglas* from the Dictionary of Decisions. In that case, a person of Scottish origin became domiciled at St. Vincent, but left that island, writing to his father and saying that his [*450] health was injured, *and he was going to America; and that if he did not succeed in America he would return to his native country. He was drowned in Canada, and some memoranda were found indicating an intention to return to Scotland, and it was held that his Scottish domicile had revived.

It seems reasonable to say that if the choice of a new abode and actual settlement there constitute a change of the original domicile, then the exact converse of such a procedure, viz., the intention to

abandon the new domicile, and an actual abandonment of it, ought to be equally effective to destroy the new domicile. That which may be acquired may surely be abandoned, and though a man cannot, for civil reasons, be left without a domicile, no such difficulty arises if it be simply held that the original domicile revives. That original domicile depended not on choice but attached itself to its subject on his birth, and it seems to me consonant both to convenience and to the currency of the whole law of domicile to hold that the man born with a domicile may shift and vary it as often as he pleases, indicating each change by intention and act, whether in its acquisition or abandonment; and further, to hold that every acquired domicile is capable of simple abandonment *animo et facto*, the process by which it was acquired, without its being necessary that a new one should be at the same time chosen; otherwise one is driven to the absurdity of asserting a person to be domiciled in a country which he has resolutely forsaken and cast off, simply because he may (perhaps for years) be deliberating before he settles himself elsewhere. Why should not the domicile of origin cast on him by no choice of his own, and changed for a time, be the state to which he naturally falls back when his first choice has been abandoned *animo et facto*, and whilst he is deliberating before he makes a second choice.

LORD COTTENHAM in *Munro v. Munro*, 7 Cl. & F. 871, says, "So firmly indeed did the civil law consider the domicile of origin to adhere that it holds that if it be actually abandoned and a domicile acquired, but that again abandoned, and no new domicile acquired in its place, the domicile of origin revives." No authority is cited by his Lordship for this. He probably alluded to some observations which *occur in the case of *La Virginie*, 5 Rob. Adm. 99, where Sir WILLIAM SCOTT said:—

"It is always to be remembered that the native character easily reverts, and that it requires fewer circumstances to constitute domicile in the case of a native subject than to impress the national character on one who is originally of another country."

In the case of *The Indian Chief*, 3 Rob. Adm. 12, the question was whether the ship was the property of a British subject; for if so, her trading was illegal. The owner, Mr. Johnson, averred that he was an American. Sir WILLIAM SCOTT held him to be an American by origin, but that having come to England in 1783 and remained till 1797, he had become an English merchant. But he

quitted England before the capture of the vessel, and letters were produced showing his intention to return to America, which he does not appear to have reached until after. And Sir WILLIAM SCOTT says, "The ship arrives a few weeks after his departure, and taking it to be clear that the natural character of Mr. Johnson as a British merchant was founded on residence only, that it was acquired by residence and rested on that circumstance alone, it must be held that from the moment he turned his back on the country where he had resided on his way to his own country he was in the act of resuming his original character, and is to be considered as an American. The character that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to him from the moment that he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi*."

Story, in his Conflict of Laws, sect. 47 (at the end), says: "If a man has acquired a new domicile different from that of his birth, and he removes from it with intention to resume his native domicile, the latter is re-acquired even while he is on his way, for it reverts from the moment the other is given up."

The qualification that he must abandon the new domicile with the special intent to resume that of origin is not, I think, a reasonable deduction from the rules already laid down by decision, because intent not followed by a definitive act is not sufficient.

The more consistent theory is, that the abandonment of [*452] the new *domicil is complete *animo et facto*, because the *factum* is the abandonment, the *animus* is that of never returning.

I have stated my opinion more at length than I should have done were it not of great importance that some fixed common principles should guide the Courts in every country on international questions. In questions of international law we should not depart from any settled decisions, nor lay down any doctrine inconsistent with them. I think some of the expressions used in former cases as to the intent "*crucere patriam*," or to become "a Frenchman instead of an Englishman," go beyond the question of domicile. The question of naturalization and of allegiance is distinct from that of domicile. A man may continue to be an Englishman, and yet his contracts and the succession to his estate may have to be determined by the law of the country in which he has chosen to settle himself. He cannot, at present at least, put off

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and resume at will obligations of obedience to the government of the country of which at his birth he is a subject, but he may many times change his domicile. It appears to me, however, that each acquired domicile may be also successively abandoned *simpliciter*, and that thereupon the original domicile *simpliciter* reverts.

For these reasons, my Lords, I propose to your Lordships the affirmation of the interlocutors complained of, and the dismissal of the appeal with costs.

Lord CHELMSFORD : —

My Lords, at the opening of the argument of this appeal for the respondent his learned counsel were informed that your Lordships were of opinion that the domicile of Colonel Udny down to the year 1812 was his Scotch domicile of origin, and that the case was therefore narrowed down to the questions raised by the appellant, — whether that domicile had been superseded by the acquisition of another domicile in England, and whether such after-acquired domicile was retained at the time of the birth of the respondent, and continued down to the period of the marriage of the respondent's parents in Scotland.

In considering these questions, it will be necessary to ascertain the nature and effect of a domicile of origin; whether it is like an after-acquired domicile, which when it is relinquished can be *re-acquired only in the same manner in which it was [*453] originally acquired, or whether, in the absence of any other domicile, the domicile of origin must not be had recourse to for the purpose of determining any question which may arise as to a party's personal rights and relations.

Story, in his *Conflict of Laws* (sect. 48), says, "The moment a foreign domicile is abandoned the native domicile is re-acquired."

Great stress was laid by the appellant in his reference to this passage upon the word "re-acquired," which is obviously an inaccurate expression. For, as was pointed out in the course of the argument, a domicile of origin is not an acquired domicile, but one which is attributed to every person by law. The meaning of Story, therefore, clearly is, that the abandonment of a subsequently-acquired domicile *ipso facto* restores the domicile of origin. And this doctrine appears to be founded upon principle, if not upon direct authority.

It is undoubted law that no one can be without a domicile. If, then, a person has left his native domicile and acquired a new one,

which he afterwards abandons, what domicile must be resorted to to determine and regulate his personal *status* and rights? Sir JOHN LEACH, V. C., in *Munroe v. Douglas*, 5 Madd. 405, held that in the case supposed the acquired domicile attaches to the person till the complete acquisition of a subsequent domicile, and (as to this point) he said there was no difference in principle between the original domicile and an acquired domicile. His Honour's words are: "A domicile cannot be lost by mere abandonment. It is not to be defeated *animo* merely, but *animo et facto*, and necessarily remains until a subsequent domicile be acquired, unless the party die *in itinere* towards an intended domicile." There is an apparent inconsistency in this passage, for the VICE-CHANCELLOR having said that a domicile necessarily remains until a subsequent domicile be acquired *animo et facto*, added, "unless the party die *in itinere* towards an intended domicile;" that is, at a time when the acquisition of the subsequent domicile is incomplete and rests in intention only.

I cannot understand upon what ground it can be alleged that a person may not abandon an acquired domicile altogether [*454] and carry *out his intention fully by removing *animo non revertendi*, and why such abandonment should not be complete until another domicile is acquired in lieu of the one thus relinquished.

Sir WILLIAM SCOTT, in the case of *The Indian Chief*, 3 Rob. Adm. 20, said: "The character that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to a person from the moment he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi*," and he mentions the case of a British-born subject, who had been resident in Surinam and St. Eustatius, and had left those settlements with an intention of returning to this country, but had got no farther than Holland, "the mother country of those settlements, when the war broke out; and it was determined by the Lords of Appeal that he was *in itinere*, that he had put himself in motion, and was in pursuit of his native British character."

Sir JOHN LEACH seems to me to be incorrect also in saying that in the case of the abandonment of an acquired domicile there is no difference in principle between the acquisition of an entirely new domicile and the revival of the domicile of origin. It is said by Story, in sect. 47 of his *Conflict of Laws*, that "If a man has

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acquired a new domicile different from that of his birth, and he removes from it with an intention to resume his native domicile, the latter is re-acquired even while he is on his way *in itinere*: for it reverts from the moment the other is given up." This certainly cannot be predicated of a person journeying towards a new domicile which it is his intention to acquire.

I do not think that the circumstances mentioned by Story in the above passage, viz., that the person has removed from his acquired domicile with an intention to resume his native domicile, and that he is *in itinere* for the purpose are at all necessary to restore the domicile of origin. The true doctrine appears to me to be expressed in the last words of the passage: "It" (the domicile of origin) "reverts from the moment the other is given up."

This is a necessary conclusion if it be true that an acquired domicile ceases entirely whenever it is intentionally abandoned, and that a man can never be without a domicile. The domicile of origin always remains, as it were, in reserve, to be resorted to *in case no other domicile is found to exist. This [*455] appears to me to be the true principle upon this subject, and it will govern my opinion upon the present appeal.

Upon the question whether Colonel Udny ever acquired an English domicile which superseded his domicile of origin, there can be no doubt that his long residence in Grosvenor Street for the space of thirty-two years, from 1812 to 1844, is calculated to produce a strong impression in favour of the acquisition of such a domicile. Time is always a material element in questions of domicile; and if there is nothing to counteract its effect, it may be conclusive upon the subject. But in a competition between a domicile of origin and an alleged subsequently-acquired domicile there may be circumstances to show that, however long a residence may have continued, no intention of acquiring a domicile may have existed at any one moment during the whole of the continuance of such residence. The question in such a case is not, whether there is evidence of an intention to retain the domicile of origin, but whether it is proved that there was an intention to acquire another domicile. As already shown, the domicile of origin remains till a new one is acquired *animo et facto*. Therefore, a wish or a desire expressed from time to time to return to the place of the first domicile, or any looking to it as the ultimate home, although wholly insufficient for the retention of the domicile of origin, may

yet amount to material evidence to rebut the presumption of an intention to acquire a new domicile arising from length of residence elsewhere. In this view it would be a fair answer to the question, Did Colonel Udny intend to make England his permanent home? to point to all his acts and declarations with respect to Scotland and his estates there, to the offices which he held, to the institutions to which he belonged, and to his subscriptions to local objects, showing, that though his pursuits drew him to England and kept him there, and his circumstances prevented his making Udny Castle fit for his residence, he always entertained a hope, if not an expectation, that a change in his fortunes might eventually enable him to appear in his country of origin, and to assume his proper position there as a Scotch proprietor.

If the residence in England began under circumstances which indicate no intention that it was to be permanent, when [*456] did it *assume the character of permanence by proof that the Colonel had intentionally given up his Scotch domicile and adopted a different one. It appears to me upon this question of fact, that throughout the whole of the Colonel's residence in London there was always absent the intention to make it his permanent home which is essential to constitute a domicile; residence alone, however long, being immaterial unless coupled with such intention. But even if it should be considered that Colonel Udny's residence in England, though not originally intended to be his permanent home, after a certain length of time ripened into a domicile, yet in 1844 he gave up the house in Grosvenor Street and returned to Boulogne, where he remained for nine years without any apparent intention of again taking up his residence in England. This abandonment of the English residence, both in will and deed, although accompanied with no immediate intention of resuming the Scotch domicile, put an end at once to the English domicile, and the domicile of origin *ipso facto* became the domicile by which the personal rights of Colonel Udny were thenceforth to be regulated.

This makes it unnecessary to consider what would have been the condition of the respondent if his birth had taken place in England before the resumption of the Scotch domicile by Colonel Udny, and the subsequent marriage of his parents in Scotland after that domicile had been resumed. Because, the domicile being Scotch, the place of the birth of the respondent is wholly immaterial, and

the case is completely governed by the authority of the cases of *Dalhousie v. McDouall*, 7 Cl. & F. 817, and *Munro v. Munro*, 7 Cl. & F. 842, in each of which the birth of the illegitimate child, and also the subsequent marriage of the parents, took place in England; but the domicile being Scotch, it was held that neither the place of the marriage nor the place of the birth affected the *status* of the child.

The existence of the Scotch domicile renders it also unnecessary to consider whether the parents of the respondent went to Scotland for the purpose merely of legitimating the respondent by their marriage there, and deprives the case of *Ross v. Ross*, 4 Wils. & Shaw, 289, which was insisted upon by the appellant, of all application. For in that *case, as stated by the [*457] LORD CHANCELLOR, "the parties were domiciled in England, the child was born in England, the parties went to Scotland for the purpose expressly of being married, and having been married, they returned to England to the place of their former domicile."

I agree with my noble and learned friend that the interlocutors appealed from ought to be affirmed.

Lord WESTBURY:—

The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions, — one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status*; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such, is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil *status* or condition of the individual, and may be quite different from his political *status*. The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy, must depend. International law depends on rules which, being in great measure derived from the Roman law, are common to the jurisprudence of all

civilized nations. It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile of the mother if illegitimate. This has been called the domicile of origin, and is involuntary. Other domiciles, including domicile by operation of law, as on marriage, are domiciles of choice. For as soon as an individual is *sui juris* it is competent to him to elect and assume another domicile, the continuance of which depends upon his will and act.

When another domicile is put on, the domicile of origin is [*458] for that purpose relinquished, and *remains in abeyance

during the continuance of the domicile of choice; but as the domicile of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicile, and it does not require to be regained or reconstituted *animo et facto*, in the manner which is necessary for the acquisition of a domicile of choice.

Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose, or *animus manendi*, can be inferred the fact of domicile is established.

The domicile of origin may be extinguished by act of law, as, for example, by sentence of death or exile for life, which puts an end to the *status civilis* of the criminal; but it cannot be destroyed by the will and act of the party.

Domicile of choice, as it is gained *animo et facto*, so it may be put an end to in the same manner. Expressions are found in

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some books, and in one or two cases, that the first or existing domicile remains until another is acquired. This is true if applied to the domicile of origin, but cannot be true if such general words were intended (which is not probable) to convey the conclusion that a domicile of choice, though unequivocally relinquished and abandoned, clings, in despite of his will and acts, to the party, until another domicile has *animo et facto* been acquired. The cases to which I have referred are, in my opinion, met and controlled by * other decisions. A natural-born [* 459] Englishman may, if he domiciles himself in Holland, acquire and have the *status civilis* of a Dutchman, which is of course ascribed to him in respect of his settled abode in the land; but if he breaks up his establishment, sells his house and furniture, discharges his servants, and quits Holland, declaring that he will never return to it again, and taking with him his wife and children, for the purpose of travelling in France or Italy in search of another place of residence, is it meant to be said that he carries his Dutch domicile, that is, his Dutch citizenship, at his back, and that it clings to him pertinaciously, until he has finally set up his tabernacle in another country? Such a conclusion would be absurd; but there is no absurdity and, on the contrary, much reason, in holding that an acquired domicile may be effectually abandoned by unequivocal intention and act; and that when it is so determined the domicile of origin revives until a new domicile of choice be acquired. According to the *dicta* in the books and cases referred to, if the Englishman whose case we have been supposing lived for twenty years after he had finally quitted Holland, without acquiring a new domicile, and afterwards died intestate, his personal estate would be administered according to the law of Holland, and not according to that of his native country. This is an irrational consequence of the supposed rule. But when a proposition supposed to be authorized by one or more decisions involves absurd results, there is great reason for believing that no such rule was intended to be laid down.

In Mr. Justice Story's *Conflict of Laws* (the last edition) it is stated that "the moment the foreign domicile (that is, the domicile of choice) is abandoned, the native domicile or domicile of origin is re-acquired."

And such appears to be the just conclusion from several decided cases, as well as from the principles of the law of domicile.

In adverting to Mr. Justice Story's work, I am obliged to dissent from a conclusion stated in the last edition of that useful book, and which is thus expressed, "The result of the more recent English cases seems to be, that for a change of national domicile there must be a definite and effectual change of nationality." In support of this proposition the editor refers to some words which appear to have fallen from a noble and learned lord in [*460] addressing *this House in the case of *Moorhouse v. Lord*, 10 H. L. C. 272, when, in speaking of the acquisition of a French domicile, Lord KINGSDOWN says, "A man must intend to become a Frenchman instead of an Englishman."

These words are likely to mislead, if they were intended to signify that for a change of domicile there must be a change of nationality, that is, of allegiance.

That would be to confound the political and civil status of an individual, and to destroy the difference between *patria* and *domicilium*.

The application of these general rules to the circumstances of the present case is very simple. I concur with my noble and learned friend that the father of Colonel Udny, the consul at Leghorn, and afterwards at Venice, and again at Leghorn, did not by his residence there in that capacity lose his Scotch domicile. Colonel Udny was, therefore, a Scotchman by birth. But I am certainly inclined to think that when Colonel Udny married, and (to use the ordinary phrase) settled in life and took a long lease of a house in Grosvenor Street, and made that a place of abode of himself and his wife and children, becoming, in point of fact, subject to the municipal duties of a resident in that locality; and when he had remained there for a period, I think of thirty-two years, there being no obstacle in point of fortune, occupation, or duty, to his going to reside in his native country; under these circumstances, I should come to the conclusion, if it were necessary to decide the point, that Colonel Udny deliberately chose and acquired an English domicile. But if he did so, he as certainly relinquished that English domicile in the most effectual way by selling or surrendering the lease of his house, selling his furniture, discharging his servants, and leaving London in a manner which removes all doubt of his ever intending to return there for the purpose of residence. If, therefore, he acquired an English domicile he abandoned it absolutely *animo et facto*. Its acquisition

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being a thing of choice, it was equally put an end to by choice. He lost it the moment he set foot on the steamer to go to Boulogne, and at the same time his domicile of origin revived. The rest is plain. The marriage and the consequences of that marriage * must be determined by the law of Scotland, the [*461] country of his domicile.

Lord COLONSAY:—

I regard this case as one of very considerable importance inasmuch as it has afforded an opportunity for bringing out, more clearly than has been done in any of the former cases, the radical distinction between domicile of origin and domicile of choice. The principles of that distinction and the facts have been so clearly put before the House that I need do no more than express my concurrence.

JUDGMENT:— Ordered and adjudged, that the said interlocutor of the Lords of Session in Scotland, of the second division, of the 14th of December, 1866, complained of in the said appeal, be varied by substituting for the words “that he never lost his said domicile of origin” these words, “and that if such domicile of origin was ever changed, yet by leaving England in 1844 his domicile of origin reverted;” and that, with this variation, the said interlocutor be, and the same is, hereby affirmed, and that the said petition and appeal be, and the same is, hereby dismissed this house.

ENGLISH NOTES.

The Scotch case of *Donaldson* (or *Maswell*) *v. M'Clure* (1857, 1860) Court of Session, 2nd series, Vol. 20, 307; Vol. 22 (H. L.) p. 7 and 3 Macq. 852, although prior in date to the two later principal cases, may be here referred to as presenting a number of the circumstances which have been considered noteworthy in determining questions of domicile. In that case the representatives of a deceased wife claimed from the surviving husband (under the same law as that on which the claim arose in *Bell v. Kennedy*) her share of the “goods in communion;” and the question was whether at the time of the death of the wife the domicile of the husband was Scotch.

M'Clure (the husband), who was of humble parentage, had his domicile of origin in Scotland. Many years previously to 1848 he had settled in Wigan, where he became prosperous, married the daughter of a townsman (who was, like himself, of Scotch birth), was made a town councillor and a magistrate, and occupied a commodious house in a street called Wallgate. Previously to the year

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1848, he had made some purchases of land and houses in Scotland. In that year (1848) his house in Wallgate was taken possession of by a railway company, and he removed with his family into a smaller and less commodious house in the same town. He made some endeavours to get a larger house in the country near Wigan, but unsuccessfully. His wife at this time being in bad health, and requiring change of air, he turned to account a piece of land which he had acquired in Scotland in the year 1842, on which there was a house. He removed the tenant, and enlarged and improved the house at an expense of £2500, and having furnished the house comfortably, took up a residence there with his wife and servants, there being no children. He did not, however, abandon the house at Wigan, which remained in charge of a housekeeper, nor did he give up the municipal office which he held there. The house at Wigan was always kept ready for him. He frequently came and stayed there and his wife came there once or twice a year. Up to a few months previously to his wife's death, which took place about two and a half years after taking up the residence in Scotland, he retained the office of town councillor at Wigan; and up to the time of his wife's death and for long afterwards he continued to hold the commission of the peace, as qualified by his residence at Wigan. During his residence in Scotland, it had been proposed to him to become a town councillor at Dumfries, but he had declined, alleging as his reason his engagements at Wigan. But during the two and a half years between taking up the Scotch residence and his wife's death, he resided much more at the house in Scotland than at Wigan, and his wife resided there almost entirely, and they were both residing there at the time of the wife's death. M'Clure himself, by his evidence tendered in his own interest, positively denied that he ever intended to reside permanently at the house in Scotland, and to leave Wigan, and asserted that his intention in taking possession of the house in Scotland was only to reside there occasionally for the benefit of his wife's health, which had brought him there. The court of Session (whose decision was affirmed in the House of Lords) unanimously held—first that previously to 1848, M'Clure had abandoned his domicile of origin and acquired a domicile in England: secondly that it was not proved that M'Clure had, at the time of his wife's death, changed that domicile for a Scotch one; and they dismissed the action.

This case seems to establish, or to illustrate, these principles. (1) Change of domicile from a domicile of choice as well as of origin must be effected *animo et facto*: (2) Where a change of domicile is relied on, the burden of proof is on the person alleging the change: (3) In a question of change, the circumstances from which the domicile of

origin is inferred may be taken into consideration, but are not of great weight, in inferring the intention: (4) The retention of municipal office and of the magisterial office requiring a residential qualification is of weight: (5) The direct evidence of the person whose domicile is in question, although an interested party, as to his own intention, may, if corroborated by circumstances, have some weight attached to it.

Several of the later cases relating to the principles of the above rule have already been stated under No. 1, *supra*. In some of them (*Douglas v. Douglas*; *In re Patience*, *Patience v. Main*) the proof of domicile of choice failed, and in *King v. Foxwell* the domicile of choice was shown to have been abandoned. In all these cases the domicile of origin prevailed. In the two following cases the crucial question was whether a domicile of choice had been abandoned.

In *Bradford v. Young* (C. A. 1885), 29 Ch. D. 617, 53 L. T. 407, 33 W. R. 860, the testator had acquired an English domicile of choice. After a lengthened residence in one house at Hartfield in Sussex, he sold the lease of that house and hired the rectory house at Storrington in Sussex where he resided with his wife for about five years. He then went to Boulogne taking with him a footman (who eventually returned with him to England) and a considerable part of his furniture, leaving the rest of the furniture at Storrington. After living about two years in France without showing any intention to make a settled home there, he returned to England, and soon afterwards died at Brighton. The judges of the Court of Appeal, differing from the judgment of Mr. Justice PEARSON, thought these facts did not show that he left England with the intention of abandoning his English domicile. But in the view they took of the case, they considered the question of domicile immaterial.

In *Re Marrett*, *Chalmers v. Wingfield* (C. A. 1887), 36 Ch. D. 400, 57 L. T. 896, 36 W. R. 344, the question was as to the domicile of a testator, whose domicile of origin was Anglo-Indian, and was himself first in the service of the East India Company, and afterwards in the service of the Nizam of Hyderabad. He left India in 1870, when he came over to England, in May, and returned to India in October the same year. During this visit he took a trip to Germany and Switzerland for about a month. He again left India in the spring of 1871, on leave for 15 months. He at once went to Darmstadt where he lived at first in an hotel, then in private lodgings for about a year, and then in a house which he purchased in 1873, and in which he made expensive improvements. He returned to India only in the latter part of 1874, and then for the purpose of winding up his affairs and settling with the Nizam's Government for his retiring pension. He was granted a

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retiring pension, and resigned his appointment. He left India and returned in April, 1875, to Darmstadt, where he resided until his death in January, 1876. There was evidence that the testator during visits to England in 1871, 1872, 1873, and 1874 had expressed an intention of coming to England, and had looked out for a house there which he could purchase, and that he had from time to time expressed dissatisfaction with his residence in Darmstadt. The Court of Appeal, affirming the judgment of STIRLING, J., decided that the domicile in Germany was proved. STIRLING, J., says (36 Ch. D. 406): "The evidence sufficiently shows that the testator went to Germany and settled there with the intention of permanently residing there,—he therefore acquired a German domicile, and the intention that it could be cast off without his leaving his place of residence is quite novel." COTTON, L. J. (at p. 407), says: "If a man loses his domicile of choice, then, without anything more, his domicile of origin revives; but in my opinion, in order to lose the domicile of choice once acquired, it is not only necessary that a man should be dissatisfied with his domicile of choice, and form an intention to leave it, but he must have left it, with the intention of leaving it permanently. . . . The fluctuations of a man's mind during his residence in a particular place are important in considering whether he ever, during his residence there, had a settled intention to make it his permanent residence; but if we arrive at the conclusion that he had, the subsequent fluctuations do not, in my opinion, if unaccompanied by change of residence, destroy the effect of residence with intention permanently to reside there."

There was formerly a question, of more importance perhaps than it is now: What was the effect upon domicile of an engagement to serve and actual service in India, under a commission in the army in the service of the East India Company? This is considered by Vice-Chancellor Sir W. PAGE WOOD in *Forbes v. Forbes* (1854), Kay, 341. He says (at p. 356): "When an officer accepts a commission or employment, the duties of which necessarily require residence in India, and he proceeds to India accordingly, the law, from such circumstances, presumes an intention consistent with his duty, and holds his residence to be *animo et facto* in India." He further observes (at p. 362) that an Anglo-Indian domicile is not an English domicile: although at the time of this decision (before the Indian Succession Act, 1865), the two domicils had been treated in some English cases as having, for the purposes of succession, the same effect. *Bruce v. Bruce* (1790), 2 Bos. & P. 229 n.; *Munro v. Douglas* (1820), 5 Madd. 379. This was on the curious fiction that a domicile in India is, in legal effect, a domicile within the Province of Canterbury (5 Madd. 406). But the fiction did not extend to make the estate liable to English legacy duty. *Attorney*

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General v. Rowe (1862), 1 H. & C. 31; *Allardice v. Ouslow* (1864), 33 L. J. Ch. 434.

The conditions of the Indian service are now entirely changed by the assumption (in 1858) of the direct sovereignty of India by Her Majesty, and the consequential alteration of the position of the commissioned officers serving in India under the Crown. They now fall under the rule that the acceptance of military service under the Crown, in whatever part of the world the service has to be rendered, does not raise any inference as to a domicile of choice. *Brown v. Brown* (1852), 15 Beav. 444; *Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574; *Ex parte Cunningham*; *In re Mitchell* (1884), 13 Q. B. D. 418, 53 L. J. Ch. 1067, 51 L. T. 447, 33 W. R. 22.

Modern authorities treat the Anglo-Indian domicile as anomalous: *In re Tootal's trusts* (1883), 23 Ch. D. 532, 52 L. J. Ch. 664; *Abd-ul-Messih v. Farra* (P. C. 1887), 13 App. Cas. 431, 5 R. C. 772.

In the former of these cases, it is considered by CHITTY, J., that a British subject resident in a treaty-port in China such as Shanghai cannot acquire a domicile there of a kind similar to that known as Anglo-Indian domicile. And although the service in certain modern chartered companies is in some respects analogous to that in the old East India Company, the period of service and modern facilities of communication afford differences which seem to avoid any such presumption as used to be applied to the officers of the East India Company. And in the case of civil service under the Crown, whether in India or elsewhere, there does not appear, under modern conditions, to be any room for the application of the principle of Anglo-Indian domicile. See *Attorney General v. Rowe* (1862), 1 H. & C. 31.

There may still be difficult questions arising in the case of persons residing for a lengthened period abroad, with an intention more or less definite of returning when they have made a sufficient fortune. There are *dicta* of Lord THURLOW in the case of *Bruce v. Bruce*, *supra*, tending to the conclusion that an indefinite intention does not rebut the presumption arising from long residence, in favour of a domicile of choice. In the case of *Cockerell v. Cockerell* (1856), 25 L. J. Ch. 730, where V. C. KINDERSLEY held the domicile to be in India, there were no expressions of intention to rebut the inference from the fact of residence, marriage, and successful commerce carried on at Calcutta. There is a similar decision of the same Judge in *Allardice v. Ouslow* (1864), 33 L. J. Ch. 434. But the decision in *Jopp v. Wood* (1865), 34 L. J. Ch. 213, of the MASTER OF THE ROLLS, affirmed by the LORDS JUSTICES, goes far to show that expressions of intention to return, though at an indefinite period and contingently on the making of a sufficient fortune, may negative the presumption that would otherwise arise from the fact

of long residence. In this case, J. S., a native of Scotland, went to Calcutta in 1805, then being aged 19. He there became a clerk in the house of F. & Co., merchant bankers, and remained as such for about two years. In 1807 he left Calcutta and carried on business on his own account as an indigo planter at different places in the province of Bengal. In 1814 he returned to Calcutta, became a partner in the house of F. & Co., and was from 1814 to 1819 an active partner in the firm. In 1816 he married. In 1819 he went to Scotland on a visit; stayed there for more than a year, and returned to Calcutta in October 1820. On his return to Calcutta, he resumed his duties as a partner in the firm of F. & Co., and from that time until his death took an active part in the business. His wife set out for England in 1825 and died on the voyage. He (J. S.) died of cholera in 1830. The father of J. S., who died in 1814, left him the preponderating interest in a family estate, to which (although it was not entailed) he had always reasonable hopes of succeeding. There was throughout his lifetime correspondence containing frequent expressions of an intention to return home when he had made enough money to pay off some burdens on the estate. The MASTER OF THE ROLLS held that J. S. never lost his Scotch domicile of origin, and the Lords JUSTICE KNIGHT BRUCE and TURNER concurred in this decision. There was no doubt here the element of a family estate, but it is noteworthy that the indefinite character of the intention to return was not held to assist the presumption afforded by the long residence. On this point the MASTER OF THE ROLLS, after referring to the Anglo-Indian domicile presumed by service under a commission in the Army of the Hon. East India Company, says (34 L. J. Ch. 217): "I have not found any case in which this doctrine has been extended to a person who becomes the servant of a private establishment abroad, or who goes abroad for the purpose of acquiring a fortune with the intention of returning at some indefinite period, when his object may have been attained. If so, any merchant who goes from this country and settles in any foreign country, in order, for instance, to correspond with a London or Liverpool house, and to do this until he has acquired a sufficient fortune to enable him to live comfortably at home, would acquire a domicile there notwithstanding the repeated and continual expression of his intention not to remain in that country, but to return as soon as he could. . . . I consider that the cases I have referred to, namely, *Bruce v. Bruce*, *Munroe v. Douglas*, and *Forbes v. Forbes*, have settled the rule as to officers and covenanted servants of the East India Company resident in India, but I consider this to be the exception; and as in this case I find that the father of the infants always intended to return to Scotland and never intended to make India his home, I am of opinion that his residence there from 1805 to 1830 did not give him an

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Indian domicil, and that he never lost his domicil of origin, which was Scotch."

AMERICAN NOTES.

The principal cases are very largely cited in Jacobs on Domicil.

Mr. Jacobs says that the decided cases clearly establish "the principle that for whatever purpose a person might have more than one domicil, he can have but one for the purposes of succession." Citing the *Somerville case*; *White v. Brown*, 1 Wallace Jr. (U. S. Circ. Ct.), 217; *Gilman v. Gilman*, 52 Maine, 165; 83 Am. Dec. 502; *Greene v. Greene*, 11 Pickering (Mass.), 410; *Dupuy v. Wartz*, 53 New York, 556; *Hindman's Appeal*, 85 Pennsylvania State, 466; and concluding: "Upon the principles laid down in most of the British and American cases, it seems impossible to conceive of a person having more than one domicil." See *Grimmett v. Witherington*, 16 Arkansas, 377; 63 Am. Dec. 66; *Allen v. Thomason*, 11 Humphreys (Tennessee), 536; 54 Am. Dec. 55; *Taylor v. Jeter*, 33 Georgia, 195; 81 Am. Dec. 202.

If the mother survives the father, the domicil of the child remains with her during widowhood. *School Directors v. James*, 2 Watts & Sergeant (Penn.), 568; 37 Am. Dec. 525; *Succession of Lewis*, 10 Louisiana Annual, 789; 63 Am. Dec. 600.

Every person receives at birth a domicil, known as "domicil of origin." Jacobs on Domicil, sect. 104, citing the *Udny case*; *Littlefield v. Brooks*, 50 Maine, 475; *Abington v. North Bridgewater*, 23 Pickering (Mass.), 170; *Crawford v. Wilson*, 4 Barbour (New York Supr. Ct.), 504; *Matter of Scott*, 1 Daly (New York Com. Pl.), 534.

If the child is legitimate his domicil of origin is that of his father; if illegitimate, that of his mother. Jacobs on Domicil, citing the *Udny case*; *Prentiss v. Barton*, 1 Brockenbrough (U. S. Circ. Ct.), 389; *Johnson v. Twenty-one Bales*, 2 Paine (U. S. Circ. Ct.), 601; *Hart v. Lindsey*, 17 New Hampshire, 235; 43 Am. Dec. 597; *Ex parte Dawson*, 3 Bradford (New York Surrogate Ct.), 130; *Allen v. Thomason*, 11 Humphreys (Tennessee), 536; 54 Am. Dec. 55; *Harkins v. Arnold*, 46 Georgia, 656; Story on Conflict of Laws, sect. 46.

The domicil of origin adheres until another domicil is acquired by choice, with the intention to remain. This is substantiated by many of the cases cited above, in addition to which reference is made to *Hallett v. Bassett*, 100 Massachusetts, 167; *Brown v. Ashbough*, 40 Howard Practice (New York), 260; *Reed's Appeal*, 71 Pennsylvania State, 378; *Quinby v. Duncan*, 4 Harrington (Delaware), 383; *Plummer v. Brandon*, 5 Iredell Eq. (Nor. Car.), 190; *Colburn v. Holland*, 14 Richardson Equity (So. Car.), 176; *Rine High. Appellant*, 2 Douglass (Michigan), 515; *Kellogg v. Supervisors*, 42 Wisconsin, 97; *Layne v. Pardee*, 2 Swan (Tennessee), 232; *Morgan v. Nunes*, 54 Mississippi, 308; *Cross v. Everts*, 28 Texas, 523; *Lowry v. Bradley*, 1 Speers Equity (So. Car.), 1; 39 Am. Dec. 112; *Shepherd v. Cassiday*, 20 Texas, 24; 70 Am. Dec. 372; *Gilman v. Gilman*, 52 Maine, 165; 83 Am. Dec. 502. But see *Hicks v. Skinner*, 72 North Carolina, 1, which holds that one may abandon his domicil of origin, either with or without the design of acquiring another, and that until he acquires another he has none except that of actual residence. Citing Wharton on Conflict of Laws, sect. 78.

The *animus manendi* at the new place is essential. *United States v. Penelope*, 2 Peter's Admiralty (U. S.), 138; *Starr v. Boston*, 1 Metcalf (Mass.), 250; *Matter of Wrigley*, 8 Wendell (New York), 134; *Eusor v. Graff*, 43 Maryland, 291; *State v. Hallett*, 8 Alabama, 159; *Veale v. Koch*, 27 Illinois, 129; *Church v. Crossman*, 49 Iowa, 444; *State v. Dodge*, 56 Wisconsin, 79; *Republic v. Skidmore*, 2 Texas, 261; Story's Conflict of Laws, sect. 44; Wharton's Conflict of Laws, sect. 56; *Gravillon v. Richards' Ex'r*, 13 Louisiana, 293; 33 Am. Dec. 563. So if the mind is changed before reaching the new place, the old domicile remains. Actual removal and actual intent to remain at the new place must unite. *Ruggold v. Barley*, 5 Maryland, 186; 59 Am. Dec. 107. Temporary absence, with the intention of returning, does not destroy the domicile. *Bucknam v. Thompson*, 38 Maine, 171; 61 Am. Dec. 237. See notes, 55 Am. Dec. 355; 56 *ibid.* 532. The old domicile is not destroyed by leaving it, with intent never to return, until a new one is actually acquired. *Ayer v. Weeks*, 65 New Hampshire, 248; 23 Am. St. Rep. 37. But when the new one is reached, his domicile therein is not destroyed by his immediately returning to the former domicile on a visit, and there dying. *White v. Tenant*, 31 West Virginia, 790. In this case the Court (after the exhaustive manner of West Virginia judges) summed up the doctrine of change of domicile, as follows: "Two things must concur to establish domicile,—the fact of residence, and the intention of remaining. These two must exist, or must have existed, in combination. There must have been an actual residence. The character of the residence is of no importance; and if domicile has once existed, mere temporary absence will not destroy it, however long continued. *Munro v. Munro*, 7 Clark & F. 842. The original domicile continues until it is fairly changed for another. It is a legal maxim that every person must have a domicile somewhere; and he can have but one at a time for the same purpose. From this it follows that one cannot be lost or extinguished until another is acquired. *Baird v. Byrne*, 3 Wall. Jr. 1. When one domicile is definitely abandoned, and a new one selected and entered upon, length of time is not important; one day will be sufficient, provided the *animus* exists. Even when the point of destination is not reached, domicile may shift *in itinere*, if the abandonment of the old domicile and the setting out for the new are plainly shown. *Munroe v. Douglass*, 5 Madd. 405. Thus a constructive residence seems to be sufficient to give domicile, though an actual residence may not have begun. Wharton's Conflict of Laws, sec. 58. A change of domicile does not depend so much upon the intention to remain in the new place for a definite or indefinite period as upon its being without an intention to return. An intention to return, however, at a remote or indefinite period, to the former place of actual residence will not control, if the other facts which constitute domicile all give the new residence the character of a permanent home or place of abode. The intention and actual fact of residence must concur, where such residence is not in its nature temporary. *Hallet v. Bassett*, 100 Massachusetts, 170, 171; *Long v. Ryan*, 30 Grattan (Virginia), 718. In *Lowry v. Bradley*, 1 Speers Equity (S. Car.), 1; 39 Am. Dec. 112; it is held that change of domicile is consummated when one leaves the State where he has hitherto resided, avow-

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ing his intention not to return, and enters another State intending to permanently settle there.' A domicile once acquired remains until a new one is acquired elsewhere *facto et animo*. Story's Conflict of Laws, sect. 47; *Hart v. Lindsey*, 17 New Hampshire, 235; 43 Am. Dec. 597. Where a person removes from one State to another, and establishes a fixed residence in the latter, it will become his domicile, although there may be a floating intention to return to his former place of abode at some future period. *Ringgold v. Barley*, 5 Maryland, 186; 59 Am. Dec. 107. 'If a man, intending to remove with his family, visits the place of removal beforehand to make arrangements, or even sleeps there occasionally for convenience, and then transfers his family, the change of domicile takes effect from the time of removing with the family; but if he has definitely changed his residence, and taken up his abode permanently in a new place, the fact that his family remains behind until he can remove them conveniently, and that he visits them occasionally, will not prevent the new place being his domicile.' *Guier v. O'Daniel*, Am. Leading Cases (733), 903; *Cambridge v. Charlestown*, 13 Massachusetts, 501."

Domicil cannot be acquired *in itinere*. Where one abandons his domicile of origin in fact, with the present intention of acquiring a new one, if he dies *in itinere*, and before he has consummated that intention by an actual residence, the domicile of origin immediately reverts and reattaches. *Smith v. Croom*, 7 Florida, 81; *Fayette v. Livermore*, 62 Maine, 229. And where one who had acquired a domicile in a foreign country, was on his return to his native country and died *in itinere*, that fact is not enough to create the presumption of an abandonment of the foreign domicile, but it must be proved that he left with the intention of such abandonment. *Mills v. Alexander*, 21 Texas, 151.

The presumption of law is that the domicile of origin is retained, until residence elsewhere has been shown by him who alleges a change of it. But residence elsewhere repels the presumption, and casts upon him who denies it to be a domicile of choice, the burden of disproving it. The place of residence must be taken to be a domicile of choice unless it is proved that it was not meant to be a principal and permanent residence. *Ennis v. Smith*, 14 Howard (U. S. Sup. Ct.), 400 (case of *General Kosciusko's will*).

The mere sending forward of one's wife and family to a new residence does not work a change of domicile until the head of the family joins them. *Casey's Case*, 1 Ashmead (Penn.), 126; *Penfield v. Chesapeake, &c. R. Co.*, 29 Federal Reporter, 494. *Contra*: *Bangs v. Brewster*, 111 Massachusetts, 382, a case of municipal domicile; the doctrine of which Mr. Jacobs regards as questionable. But it seems that a new domicile is acquired by the going forward of the head of the family, although he intends to return for his family. *Jacobs on Domicil*, p. 252, comparing some conflicting cases.

A distinction must be observed between national character and allegiance. The former may change *in itinere*. *The Venus*, 8 Cranch (U. S. Sup. Ct.), 253, 280; Story's Conflict of Laws, sect. 48.

If the intention of permanently residing in a place exists, any residence in pursuance of that intention, however short, will establish a domicile. 5 Am.

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& Eng. Cyc. of Law, p. 863, (citing *Bell v. Kennedy*); *Horne v. Horne*, 9 Ir-dell Law (Nor. Car.), 99; *Parsons v. Bangor*, 61 Maine, 457; *Cadwalader v. Howell*, 3 Harrison (New Jersey), 138; *Hart v. Horn*, 4 Kansas, 232; *Carey's Appeal*, 75 Pennsylvania State, 201; *Swaney v. Hutchins*, 13 Nebraska, 266.

The doctrine of reverter of domicile is adopted in 5 Am. & Eng. Cyc. of Law, p. 865, citing the Udny and Bell cases, but no analogous American cases.

As to the doctrine of reverter established in the *Udny case*, Mr. Jacobs says (Domicil, sect. 113): "Leaving out of view several *dicta* by — it must be confessed — illustrious jurists, no American authority has ever gone — perhaps it might be added, ever will go — to the same length as *Udny v. Udny*. It is true that the precise question seems never to have been raised. . . . The doctrine of reverter has been, up to this time at least, confined by the American decisions to cases where there was an *animus revertendi* to the domicile of origin." Mr. Jacobs devotes an entire chapter to Reverter of Domicil, devoted to and criticising the Udny case, and citing Story's rule substantially as our law: "Reverter takes place only when the party has abandoned his acquired domicile, and is *in itinere* to the place of his original domicile." (Domicil, sects. 191, 201). *In re Walker*, 1 Lowell (U. S. Circ. Ct.), 237; *The Francis*, 1 Gallison, (U. S. Circ. Ct.), 614; *Johnson v. Twenty-one Bales*, 2 Paine (U. S. Circ. Ct.), 601; *Bank v. Balcom*, 35 Connecticut, 351; *Matter of Wrigley*, 8 Wendell (New York), 134, 140; *Reed's Appeal*, 71 Pennsylvania State, 378; *Mills v. Alexander*, 21 Texas, 154.

Kellar v. Baird, 5 Heiskell (Tennessee), 39, and some *dicta* in *The Venus*, 8 Cranch (U. S. Sup. Ct.), 252, look the other way.

No. 1. — Ward v. Turner, 2 Ves. Sen. 431. — Rule.

DONATIO MORTIS CAUSÂ.

No. 1 — WARD v. TURNER.

(1752.)

No. 2. — DUFFIELD v. ELWES.

(1827.)

RULE.

By English law *donatio mortis causâ* is a gift made by a person in expectation of death, conditional upon the donor not surviving and revoking it.

If the subject-matter is capable of delivery, actual delivery is indispensable to vest the property. Where a certain instrument in writing is essential to the complete legal title to property, the delivery of that instrument with the intention to pass the property will be effectual as a *donatio mortis causâ*. But in the case of stocks which are capable of legal transfer by instruments the possession of which is not essential to the title, there is no valid gift without such transfer.

Ward v. Turner.

2 Vesey Sen. 431-445.

Donatio mortis causâ. — Delivery of Stock Receipts.

Where *donatio mortis causâ* is alleged, actual delivery is indispensable [431] to vest the property, if the subject-matter is capable of delivery. If it be not so, there must be a delivery of what is equivalent to it at law. In the case of stock, &c., delivery of the receipts, &c., not sufficient to constitute such a gift, though strong evidence of the intent.

The end of the bill was to have a transfer of £600 new South Sea annuities made to the plaintiff as executor of John Mosely, and to have certain specific parts of the personal estate of William Fly,

dead intestate, delivered or made over to the plaintiff. Another prayer of the bill was to have an account of what was due to Mosely for services performed to Fly, against whose estate this demand was made.

The case, the plaintiff made, was this: he was executor of Mosely, who was related to Fly by affinity, having married his aunt; that Fly had great obligations to Mosely, who took care of him in his infancy: and at his house Fly used to come from school, when it broke up; and afterward Mosely, who in the latter part of his life appeared to be in very mean circumstances, lived with Fly as his servant until Fly's death; had his victuals there; performed services to him; and had now and then a shilling given him: from thence Fly made profession of a strong intent to do for him at his death, and had great kindness for him; in pursuance of which, as Fly drew near his end, being in a very bad state of health, during that time he made Mosely several donations *mortis causâ* in prospect of death. Four times were fixed on by the witnesses, of which several were examined in the cause, speaking of actual gifts and declarations supporting them. First, 18th January, 1746, which was spoken to be by the porter of Furnival's Inn. The second, 6th February, 1746, which was the principal proof relied on by the plaintiff to support the gifts of these annuities, and was proved by Fly's barber; who being sent for [432] by Fly found Mosely with him, and no other; and swore to the particular words used, and declarations made, that Fly said to him: *viz.* "I intend to give him (speaking of Mosely) Longford estate for his life; but I have considered of it; and that which is worth £40 a year to another, is not worth so much to him; for if the tenants wanted an abatement for repairs, he would allow it; and therefore I will do better for him." That thereupon Fly went to his escritoir, and taking three papers said, "I give you Mosely these papers, which are receipts for South Sea annuities, and will serve you after I am dead." The third, 23rd February, which was proved by one, who swore, that in his presence Fly said, "Mosely, I give you all the goods and plate in this house." Fourthly, 3rd March, by the said barber, who swore, that Fly declared to him and to another person, who alone were present, that he gave to Mosely all his household goods, money, arrears of rent, and everything that should be found in his house, except his sword, gun, and books; and that this

together with those three receipts would make £2000; that he wished a gentleman of his acquaintance had his sword and gun, but all the rest he gave to Mosely. He died in April following.

These were argued to be so many declarations of bounty, supported by so many witnesses at different times. Two questions arose, first, whether in fact these things were given? Secondly, whether properly given in point of law? Donations *mortis causæ* are derived from the civil law. Justinian's Inst. lib. 2, tit. 7, shows the nature of them; and that in general any thing is properly the subject-matter of such donations that may be the subject-matter of a legacy or donation *inter vivos*. Either rights in possession or reversion are capable of being so given. It is not necessary that donor should have a legal interest; an equity will do, when by no act he can pass the legal property; consequently the formalities accompanying such donation must be according to the subject of the gift. Livery then cannot be always necessary; as in a *chose in action* or simple-contract debt, which lie not in livery, *choses in action* were not assignable: but now are in this Court as much as things in possession by the rules of law: and therefore this Court will carry into execution a voluntary gift of a *chose in action*. In *Lawson v. Lawson*, 1 Wil. 441, such a gift of a note drawn on a goldsmith, which in point of law passed nothing, was held good. *Jones v. Selby*, Pre. Chan. 300; *Gold v. Rutland*, Eq. Ab. 347. In *Snelgrove v. Bailey*, 3 Atk. 214, Mrs. Bailey, going out of town in a bad state of health, gave her maid a bond executed to her by a third person; saying, "if I die, it is yours." She died intestate; the plaintiff was her administrator: thus it stood on defendant's answer. A bill being brought for discovery and delivery of effects of the intestate in hands of defendant, the question was, whether the nature of the property was capable of being so given? [433] His Lordship held, it might as well as a specific chattel: though no legal property passed thereby, nothing but the paper, a bond being evidence of a debt, and the intent being to give the debt, not the paper, the Court held it a good donation *mortis causæ*, comparing it to the property which passes by assignment of a bond, which passes nothing in point of law, and the assignee must make use of the other's name for recovery on it. That case rested singly on the averment in the answer: in this is strong evidence. The Court there put this case; that if a chattel in possession had been bought by the intestate, and a bill of sale made to a trustee

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for her use, the property would have been in the trustee, and the equitable interest in the *cestuy que trust*, who if she had given this chattel so circumstanced to the defendant, it would have been good.

LORD CHANCELLOR : —

That is a case put upon an equitable interest. There the chattel itself must have been delivered.

For plaintiff. Though these donations differ in some respects from testamentary dispositions, yet they participate in a great degree; for like that it is a declaration of his mind, what he will have done with his property, when he is no more; he does not part with the property or even the use of the thing in his life; for that would prevent any such disposition from being ever made. Where the thing lies in livery, the livery is not made to complete, it is only evidence of, the gift: and if the moment after possession delivered (with a declaration that he intended, if he died, it should be the donee's absolutely) the thing was restored by donee, that would not tend to defeat the gift.

LORD CHANCELLOR : —

I apprehend it would; and that such an instantaneous gift and taking back would not do, which it would be dangerous to admit.

For plaintiff. But where livery cannot be, the best evidence the nature will admit, being only to show the mind of donor, will do. Here is such a delivery over as is sufficient evidence of the gift of these annuities. They certainly lie not in livery, there being other ways of passing them. There is no evidence of them but one's name being placed in the book. The delivery then with strong words of gift of these receipts, which were the only symbol of his property, was as much as he could possibly do toward giving it, except a mere transfer in the books, which was not necessary, nor could he conveniently do that; and it was giving with a prospect of not recovering of that particular illness; for that of itself would be a revocation: but he died of it, and within two months of the gift. In cases of livery of seisin it is not necessary [434] to deliver the thing itself or any part; for coming upon the land, and delivering a gold ring thereon is enough, 1 Inst. 44, though not participating of land: but there ought to be clear proof of the intent, which there is here. Next as to the specific things, it is said there was not sufficient possession delivered: but in such a number of things it is not necessary every one should

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be delivered. The subject of the gift is what was then in the house. If a delivery is absolutely necessary, the plaintiff has not indeed proved it; but Mosely was actually in the house with him, and is then as much in possession as if actually delivered to him, which is not necessary if he is in possession. If one is recited to be in possession of a house, livery is not necessary. If one does as much as he can towards possession, it is all that is required; as delivery of the key of a warehouse; so of a piece of parchment, delivery of a ship and of the actual possession of it to the mortgagee, as determined by your Lordship in *Brown v. Williams*. No more could be done here, for he could not carry the goods out of the house; and he was then in possession. However, as this is a bill for discovery of assets, if plaintiff is not entitled to these gifts, he is at least to a reasonable satisfaction for his services.

On the part of the defendant, administrator of Fly, there was no evidence to impeach the evidence of the gift, but to invalidate it to a certain degree, principally from the behaviour of Mosely after death of Fly, as not like one who thought he had a right to these donations from him; for it was sworn, that being at the house of Fly at his death, he continued there until midsummer; he did not say, these goods were his own upon application made to buy them, but that they were Turner's, the administrator and next of kin; sent to Turner, desiring him to take them away; that they were sent away, and Mosely assisted in packing them up, and declared he would not go into mourning, for that Fly had given him nothing that he could help. A donation *mortis causâ* (though there is indeed such a thing in the law) is of a very delicate nature, and from its import merely voluntary.

LORD CHANCELLOR:—

Such donations are subject to debts.

For defendant. If there is no distinction between testamentary dispositions and such a donation, and there is a former will, the Statute of Frauds will be overturned, which relates to all wills of personal estate: therefore since the statute, no nuncupative will or codicil can be set up, where a will was made before. [435] The statute has expressed an anxiety as to nuncupative wills, not taking them away absolutely for fear of breaking in upon the real intent, but, seeing them liable to uncertainty, litigation, and perjury, has put several restrictions on them; whereas if the said distinction is not observed, a nuncupative will may take place,

proved at any time and that by a single witness, where more than one would not be ventured for fear of contradiction, and that at any distance of time, nor confined to £30, as the statute required. A testamentary disposition is a gift in case of, and only has operation, after death. A donation then cannot be in general in case of death, but must have something peculiar differing from legacies. The characteristic of it is this. It is not on a general apprehension of approaching mortality, but where the particular recovery of the donor is annexed by way of defeasance to the gift, which would be otherwise absolute. It may be confined to an immediate illness; but the Roman law puts the case of a man's going a journey, which was formerly more hazardous than now; so if going to battle, and in case he is killed, and makes that gift; so if under bad state of health he makes a complete gift, if he does not recover; that must mean some circumscribed time or illness, and there must be some sort of defeasance arising from the recovery or return home to these donations; otherwise it is an absolute gift. But though liable to be defeasanced, it must be a complete gift before *inter vivos*; and that is the reason the Ecclesiastical Court has no probate or jurisdiction over it, as it would if testamentary. Next, to consider what is meant by delivery in the Roman and civil law-books, as far as admitted in this country; for as it is in all the books, it will not hold here. Where delivery is necessary to make that complete *inter vivos*, if a man said, I give it, and there is no delivery, it would be *nudum pactum*, there could be no title or action. Then delivery is there put only to show that the gift must be complete. In that new species of property the actual delivery is supplied by that which is equivalent to delivery; as in case of a ship delivered by bill of sale, which is defeasanced in case of recovery; that is enough; but it must be complete according to the nature of the thing, otherwise it cannot be distinguished from a legacy. A delivery is necessary according to Swinb. in each of three instances he puts, of a donation *mortis causâ*. *Lawson v. Lawson* turned upon it, and could not be admitted but on that foundation. There cannot indeed be such a donation by parol of a book or simple-contract debt, or of arrears of rent; because there can be no delivery, and no inconvenience, because it may be easily done another way. Taking it in case of a specific thing, as a horse, &c., possession is altered (as Swinb. supposes), and then donee shall enjoy it; otherwise no difference between this and a testamentary dis-

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position. This donation therefore takes effect, but still liable to that contingency. There is no case that donor [436] must keep possession in his life; how then can he have the use or benefit of it, taking it to be a specific thing? As to a *chose in action* being allowed to be given, that was a new case before your Lordship: for *Snelgrove v. Bailey*, 3 Atk. 214, which was of a bond, was the first ever determined upon anything of a *chose in action*. The reason the Court went on there was, that it was as complete a gift as could be made of a bond; for writing not being necessary to assignment of a bond, if all was delivered that could be, all that was required was done. It was a substantial gift of the paper and seal, without which there could be no recovery on it. A bond carries the debt itself, not only evidence or security of it; therefore is considered as *bona notabilia*, and not only where the party dies, like other *choses in action*; and a Court of equity does not say a bond must be delivered by deed in writing. In *Richards v. Syme*, 2 Atk. 319, on gift of a mortgage to mortgagor by giving him the deeds, your Lordship held, that if that fact was proved, it was a gift of all the money on the securities, and not within the Statute of Frauds. So that the bond there is as completely given as can be, supposing that parol evidence is sufficient, and writing not necessary. If that was not the ground of that determination, and no delivery requisite, but that it is to remain with donor until his death, and only a formal delivery, it will not differ from the inconveniences intended to be guarded against by the Statute of Frauds; for then every loose declaration will be set up, notwithstanding solemn wills before executed. It is dangerous to support parol declarations upon gifts of this kind, not accompanied with a visible act to give notice to all the world, as delivery; and the statute has thought it better, that some of these true gifts should fail (as has frequently happened for want of the solemnities thereby required), than there should be a public inconvenience. If a common *chose in action* cannot be delivered, how can this? which is stronger, as it is capable of being assigned by a proper transfer. If indeed one goes as far as he can, the Court will perhaps supply it as in those cases on the stat. Jac. I. in *Ryal v. Rowles*, 1 Ves. Sen. 348, but that is not the case here. Fly was a man of business, an attorney, yet waits near two months without doing that which would effectuate it. That argument of the testator's having time to make a perfect gift, is often used in Doctors Commons on imperfect wills

This Court will never support that as a donation, which may be a gift by will; for there must be a difference between them.

LORD CHANCELLOR in the outset laid the other goods out of the case, of which there was no pretence of any delivery; [437] which would be very dangerous; and that it was impossible to make such a complex donation *mortis causâ* as a general bequest of all one's personal estate, or of a residue without some proof of delivery; for that would be the same as a nuncupative will, and it was a pity the Statute of Frauds did not set aside all these kinds of gifts. But what weighed with him was, whether the stock without delivery was a good donation *mortis causâ*: which question, considering the vast proportion of property in such funds, was of infinitely greater consequence than the value of it; therefore he should not determine it hastily. If Courts of justice were compellable by rules of law to suffer such gifts without any transfer to prevail, it could not be helped; but then the Statute of Frauds relative to nuncupative wills would be so far nugatory and vain.

Having taken time to consider, his Lordship now delivered his opinion.

There are two general questions. What is the weight and strength of the evidence in point of fact? Next, the result of that evidence in point of law, or the law arising on this fact?

As to the first, and as to the conviction arising therefrom, there is, to be sure, very strong evidence on the part of the plaintiff of Fly's general intention of bounty, which is not to be disputed; but as to evidence of the particular gifts, I cannot help taking notice, that the declarations relied on by the plaintiff to prove them are all made to persons of extreme low degree, his porter, barber, &c. It is observable also, that Fly was bred an attorney; had some property, some real estate, was a man of business: and must be presumed from his profession and education to know something of what the law required to make a will: and certainly it would be more easy for him to have made a will in writing than to have taken all these several steps to give away these parts of his estate. It is likewise observable, that the behaviour of Mosely, and his declarations after the death of Fly, are some impeachment and weakening of the plaintiff's evidence: for it is extraordinary, that, if he thought himself entitled, he should not insist upon these goods being his own instead of suffering them to be taken away and assisting therein. At the same time, if I was to ground my opinion

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upon any objection to the evidence in point of fact, I should not determine it, but send it to be tried; for this is as proper a case to be tried as any other. It is not insisted upon by the plaintiff as a testamentary cause; for if he was to insist on that, it would overturn his demand, as he has no probate; but is insisted on as a donation *mortis causâ*. Trover might be brought for it; for it would transfer the property; but though I have searched for it, I do not find a case of that kind in the books, of such an action at law; but it might be tried at law, was there a foundation for it; and if I was to ground my opinion upon the evi- [438] dence in point of fact, I would direct a trial. But according to my opinion, there is no reason to give the parties that trouble; for next, supposing the fact well proved, the consideration is the result in point of law.

The relief sought is founded upon these gifts being good donations *mortis causâ*.

First, as to any specific parts (if they may be so called) except the annuities. They are clearly not good (as I declared at the hearing) there being no pretence of any delivery in any shape whatever. They are so general, as in my opinion, if they prove any thing, prove an intent to make a nuncupative will of all his personal estate (this is exclusive of the annuities) saying, ‘Mosely I give you all the plate and goods in this house,’ or, ‘if I die, all are yours’: but nothing was delivered. It is said, he had possession by living in the house, and did not want delivery; but he lived as a servant who had no possession: so that if a servant had them in custody, it would be a possession for his master. The other declarations are not only of the goods, but of all money and arrears of rent, and to extend almost to every thing: consequently there is no ground to carry it so far: and it is impossible to support any of these as gifts in prospect of death, as I have declared already.

Next, as to the gift of this annuity. If the witnesses deserve credit, it is strong evidence of a general intent of bounty: but it rather turns against the plaintiff, for it shows a general intent to give the whole to Mosely, by making a nuncupative will or wills at different times. If that was to be admitted to support these several gifts as so many donations *mortis causâ*, it would overturn not only the letter but the whole spirit and intent of the Statute of Frauds. But notwithstanding, suppose this gift of the annuities was just as if it was a distinct and independent donation from the other

matters insisted on as gifts, the question is, whether it is such a gift as the law of England allows as a donation *mortis causæ*? First, the fact of the gift is proved only by one witness: whereas the civil law, from which this doctrine is taken, requires five witnesses thereto: for Justinian, when he allowed these gifts, was apprehensive of fraud arising from them; and takes notice in that very chapter relied on for the plaintiff, that he had made a constitution to regulate it, that it should be in the presence of five, limited in point of value, &c., which shows how jealous he was of it. Besides the witness swears to this in very formal words: and though it is pretty hard to object to a witness as loose and uncertain on one

hand, and the contrary on the other, yet this argues either a [439] very strong memory or a pretty strong assurance in swearing. But the express gift, as he swears, is only of the three receipts. — That is the form of the gift. Taking it therefore according to the substance of the gift, that this amounted to a declaration, that Fly by giving these receipts intended to give the annuities, upon this the principal point arises; whether delivery of the thing given by way of donation *mortis causæ* is necessary: and, if necessary, whether this delivery of the receipts is sufficient delivery of the thing given by way of donation *mortis causæ*? I am of opinion, that delivery is necessary to make good such a gift: and that the delivery of these receipts for the consideration-money of the purchase of them was no sufficient delivery to validate this act. To clear this, it is proper to consider the notion of a donation *mortis causæ* according to the civil and Roman law and the law of England. According to the civil and Roman law there is great variety, and several passages therein are pretty difficult to reconcile. Digest, Lib. 39, Tit. 6, Law 38, requires, that both donor and donee should be present at the time of the gift, *quo præsens præsentī dat*; which looks as if delivery was intended at the time. It is *quo* there and in several editions; but in the Lyons edition of Gothofredus' Corpus it is *quod*; which makes it sense. Next in Digest, same Tit., Parag. 1, it speaks of it throughout as a restoring of the same thing, if donor should recover: as if a restitution was to be. It is proper to take notice, that in the Roman law there were three kinds of donations *mortis causæ*. And in Voet on the Pandect, Lib. 39, Tit. 6, Parag. 3, in his 2d Vol. page 710, the division is agreeable to that made of these donations by Swinburne (see in *Tate v. Hilbert* 2 Ves. jun. 119; 2 R. R. at p. 181). The first is a donation by

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one in no present danger, but in consideration of mortality, if he died; and this is strictly compared to a legacy; for the property was to pass at the death, not at the time. The second kind is, where the property passed at the time defeasible in case of an escape from that danger in view or of recovery from that illness. The third was, where, though he was moved with the danger, yet not thinking it so immediate as to vest the property immediately in the person, but put it in possession of the person as an inchoate gift to take effect, in case he should die. Vinius's Comment on this place of Justinian is more particular: puts the remedy by action, donor might have, in case he repented or revoked. That is on the last kind of donation *mortis causâ*; where he did not part with the property immediately, he should have a real action: but where he actually parted with the property, but the gift was to be defeated by his revocation, or recovery, or escape from that danger he was in, *conditionem habeat* (which is a personal action), to make the irritancy, or to recover damages for the thing: so that it differed not but in the nature of the action. And in Calvin's Lexicon, &c., that is the distinction. Swinb., on the text I have quoted, [440] implies there should be a delivery; saying, that legacies differ from such donations; for that legacies are not delivered by the testator; but to be paid or delivered by the administrator; putting the distinction upon the one being delivered in life, the other after death. But notwithstanding this, several books in the civil law import the contrary; particularly Vinius in his Comment. Lib. 2, Tit. 7, Sec. 1, Numero 2; Cobaruvius, 1 Vol. Rub. 3, and Voet on the Pandect, same Chapter, Num. 3, and Num. 6, which passages show the different expression and opinions, some importing a delivery, others not. I have mentioned them to come at that which seems the distinction reconciling them all, according to what is laid down by Voet, Numb. 6, that they did not require an absolute delivery of possession to the first or third kind of gift I have mentioned: but in the other case, where the property was to pass immediately, it was required: which is the meaning of the expression in Voet, *in mortis causâ donatione Dominium non transit sine traditione*, and of that other expression in Voet. With this distinction these passages in the civil law are properly reconciled. Though I know these donations *mortis causâ*, could never come directly in question in the ecclesiastical Court, they might collaterally; and on these two heads I inquired whether there have been any cases there upon

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this : viz. in suits against an administrator on account of assets by the next of kin, where the administrator had insisted he could not administer such a part, because it was given *mortis causâ* : or if there is a will, in which there are specific legacies, and one of those legacies he had given in his life by way of donation *mortis causâ*, there it might come in question in the ecclesiastical Court : but I cannot find it has. The nearest case to it is *Ousley v. Carrol*, June, 1722, in the Prerogative Court before Dr. Bettesworth. There was left a writing in presence of three witnesses, not in the form of a will, but a deed ; viz. “ I have given and granted, and give and grant, to my five sisters and children of the sixth, their heirs, executors, and administrators, in case they survive me, all my goods and chattels, and real and personal estate, and all which I may claim in right of my own, whether alive or dead.” The dispute was by a person claiming as his wife, and who had been so, but divorced ; who insisted, this was no will, but deed of gift *mortis causâ* (and a gift *mortis causâ* may be made in writing as well as otherwise, and so it might by the Roman and civil law) but the ecclesiastical Judge was of an opinion this was testamentary ; proved it as such as a testamentary act, and probate was granted : from which there was no appeal ; but a case was there cited of *Shargold v. Shargold*, upon deed of gift by Dr. Pope not to take place until his death, and sixpence delivered by way of symbol to put grantee in possession ; that was pronounced for as a will, [441] not as a donation *mortis causâ* ; which I mention to show how far the ecclesiastical Court has considered these things as testamentary. Having considered these donations, the different species, and how far delivery is necessary by the Roman and civil law, I will consider it according to the law of England. They are undoubtedly taken from the civil law ; but not to be allowed of here farther than the civil law on that head has been received and allowed. Taking the law of England to consist (as Hob. says) of rules of law and equity, it might have come in question in cases of action of Trover and Detinue : but I have never found any action on that head. Consider it therefore as in this Court ; the civil law not binding here but as far as received and allowed ; which must be from adjudged cases and authorities, proving that the civil law has been received in England in respect of such donations only so far as attended with delivery, or what the civil law calls *traditio* ; for which Swinb. who being an English writer on the civil law, what

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he lays down is some evidence of what has been received here, Part 1, Sect. 7, but in other places, Sec. 6, in Tit. *Definition of Legacy*, he is still more express. In both places, in one directly, in the other collaterally, he lays down, that delivery is necessary. Next consider it on the resolutions of this Court: the same thing results from them. There are not many cases on this head; and they are somewhat loose. The first is *Drury v. Smith*, 1 Will. 404, where Lord COWPER founded himself on this and the possession transmitted and changed: next *Lawson v. Lawson*, 1 Will. 441. All that I can collect from thence is, that the purse was held good, because delivered to the wife herself. As to the other legacy of £100 bill, I cannot say on what it depended. It is a kind of compound gift; so many collateral circumstances are taken into it, that nothing can be inferred from it: but, being a draft on his goldsmith, that draft was delivered so that it does not contradict what I lay down; and there was delivery, so far as it was capable. In *Jones v. Selby*, Chan. Pre. 300, the result is, that the opinion of the MASTER OF THE ROLLS was founded plainly on this of the delivery of possession; holding that the gift of the tally, as contained in the hair-trunk, was a good donation *mortis causâ*; and that Lord COWPER avoided determining that on the foundation of the subsequent point of a satisfaction or ademption, on which he grounded his determination. In all the instances it is absolutely necessary to be the person's after the party's death: though in some cases it vests the property, in others not. But to explain more fully Lord COWPER's opinion there, I will refer you back to *Drury v. Smith*, and to *Hedges v. Hedges*, Chan. Pre. 269, which turned on another point; but there Lord COWPER laid down a necessity of delivery very strongly, where he says, testator gives with his own hands. In the case of *Snelygrove v. Baily*, 3 Atk. 214, determined by me 11 March, 1744; where a bond was given in prospect [442] of death: the manner of gift was admitted; the bond was delivered; and I held it a good donation *mortis causâ*. It was argued, that there was no want of actual delivery there or possession, the bond being but a *chose in action*, and therefore there was no delivery but of the paper. If I went too far in that case, it is not a reason I should go farther: and I choose to stop there. But I am of opinion that decree was right, and differs from this case; for though it is true, that a bond, which is specialty, is a *chose in action*, and its principal value consists in the thing in action, yet

some property is conveyed by the delivery; for the property is vested; and to this degree that the law-books say, the person to whom this specialty is given, may cancel, burn, and destroy it; the consequence of which is, that it puts it in his power to destroy the obligee's power of bringing an action, (3 Atk. 214) because no one can bring an action on a bond without a *profert in Cur.* Another thing made it amount to a delivery, that the law allows it a locality; and therefore a bond is *bona notabilia* so as to require a prerogative administration, where a bond is in one diocese, and goods in another. Not that this is conclusive: this reasoning I have gone upon is agreeable to Jenk. Cent. 109, case 9, relating to delivery to effectuate gifts. How Jenkins applied that rule of law he mentions there, I know not: but rather apprehend he applied it to a donation *mortis causâ*: for if to a donation *inter vivos*, I doubt he went too far. Another case is *Miller v. Miller*, 3 Will. 356; which is a very strong case, so far as that opinion goes, to require delivery; which case, I believe, was hinted at as inconsistent with my decree: but there is a great difference between delivery of a bond (which is a specialty, is itself the foundation of the action, and destruction of which destroys the demand) and the delivery of a note payable to bearer, which is only evidence of the contract. Therefore from the authority of Swinb. and all these cases the consequence is, that by the civil law, as received and allowed in England, and consequently by the law of England, tradition or delivery is necessary to make a good donation *mortis causâ*: which brings it to the question, whether delivery of the three receipts was a sufficient delivery of the thing given to effectuate the gift. I am of opinion it was not. It is argued, that though some delivery is necessary, yet delivery of the thing is not necessary, but delivery of any thing by way of symbol is sufficient: but I cannot agree to that; nor do I find any authority for that in the civil law, which required delivery to some gifts, or in the law of England, which required delivery throughout. Where the civil law requires it, they require actual tradition, delivery over of the thing. So in all the cases in this Court delivery of the thing given is relied on, and not in name of the thing; as in the delivery of sixpence in *Shargold v. Shargold*: if it was allowed any effect, that would have been a gift *mortis causâ*, not as a will, but that was allowed as [443] testamentary, proved as a will, and stood. The only case wherein such a symbol seems to be held good is *Jones v.*

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Selby, but I am of opinion that amounted to the same thing as delivery of possession of the tally, provided it was in the trunk at the time. Therefore it was rightly compared to the cases upon 21 J. 1. *Ryal v. Rowles* and others. It never was imagined on that statute, that delivery of a mere symbol in name of the thing would be sufficient to take it out of that statute: yet notwithstanding, delivery of the key of bulky goods, where wines, &c., are, has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing: and therefore the key is not a symbol, which would not do. If so, then delivery of these receipts amounts to so much waste paper; for if one purchases stock or annuities, what avail are they after acceptance of the stock? It is true, they are of some avail as to the identity of the person coming to receive: but after that is over, they are nothing but waste paper, and are seldom taken care of afterwards. Suppose Fly, instead of delivering over these receipts to Mosely, had delivered over the broker's note, whom he had employed, that had not been a good delivery of the possession. There is no colour for it; it is no evidence of the thing, or part of the title to it; for suppose it had been a mortgage in question, and a separate receipt had been taken for the mortgage-money, not on the back of the deed (which was a very common way formerly, and is frequently seen in the evidence of ancient titles), and mortgagee had delivered over this separate receipt for the consideration-money, that would not have been a good delivery of the possession, nor given the mortgage *mortis causâ* by force of that act. Nor does it appear to me by proof, that possession of these three receipts continued with Mosely from the time they were given, in Feb. to the time of Fly's death; for there is a witness who speaks, that in some short time before his death Fly showed him these receipts, and said, he intended them for his uncle Mosely. Therefore I am of opinion it would be most dangerous to allow this donation *mortis causâ* from parol proof of delivery of such receipts, which are not regarded or taken care of after acceptance; and if these annuities are called *choses in action*, there is less reason to allow of it in this case than in any other *chose in action*; because stocks and annuities are capable of a transfer of the legal property by Act of Parliament, which might be done easily; and if the intestate had such an aversion to make a will as supposed, he might have transferred to Mosely: consequently this is merely legatory, and amounts to a nuncupative will, and contrary

to the Statute of Frauds, and would introduce a greater breach on that law than ever was yet made ; for if you take away the necessity of delivery of the thing given, it remains merely nuncupative. [444] To this purpose consider the clauses in the Statute of Frauds relating to this ; which seems to me to be applied directly to prevent a mischief of this sort. The clauses are in sec. 19, 20, 21, 22, which have very anxious provisions against dispositions of this kind, requiring three witnesses, solemn declaration of testator, fixing the place of making, and to be reduced into writing in six days after making. These are in cases where no will was made. Next comes another requisite, where a will has been made. If what the plaintiff insists on is right in point of law, that this gift of the annuities by delivery of the receipts was good, yet, though Fly had made a will before, it had been equally good notwithstanding that will, because this relates to revocation of a will in writing by anything amounting to a testamentary act. It would be good against the will, as appears from the cases. Would not that be quite contrary to the plain provision of this clause, taking away delivery of the thing ? Here is then a revocation of a will by words only ; viz. "This is yours when I die." All these clauses therefore will be overturned, if such evidence is admitted. But it is said, if this is not allowed, it will be impossible to make a donation *mortis causâ* of stock or annuities, because in their nature they are not capable of actual delivery. I am of opinion, it cannot without a transfer, or something amounting to that : and there is no harm in it, considering how much of the personal estate of this kingdom, vastly the greatest proportion of it, subsists now in stock and funds : and all the anxious provisions of the Statute of Frauds will signify nothing, if donation of stock, attended only by delivery of the paper, is allowed. It might be supported to the extent of any given value, and would leave these things under the greatest degree of uncertainty ; and amount to a repeal of that useful law as to all this part of the property of the subjects of this kingdom. Therefore notwithstanding the strong evidence of the intent, this gift of annuities is not sufficiently made within the rules of the authorities ; and I am of opinion not to carry it further. If any doubt remains in any one's mind, I will add (what I very seldom do, though it has been done by my predecessors) that I should be very glad to have this point settled by the supreme authority ; for it highly ought to be settled, if there is a doubt, considering so large a property of this kind.

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The bill ought to be dismissed therefore without costs as to the demand of these annuities, or any other part of the intestate's estate by way of donation *mortis causâ*.

But as there was a plain intent of bounty and kindness to this old man, who lived with him as a servant, and it seems, in expectation of what should be given at his death, therefore on the other part of the bill an inquiry should be, what Mosely deserved over and above his maintenance for services performed during life of Fly. The account should be taken from a reasonable time, if the plaintiff thinks fit to pray it.

Duffield v. Elwes.

1 Bligh, N. S. 497-544.

Donatio mortis causâ. — Gift by Delivery of Deeds.

E. having by his will made a certain provision for his daughter, an [497] only child — with whom he had been offended on account of a clandestine marriage, but was reconciled to her and her husband — declares to a common friend his purpose to make farther provision for his daughter. Being on his death bed, and unable to write, he is urged by that friend to make a gift to his daughter of certain monies secured by mortgage and bond, and expressly assents to that proposal. In the evening of the same day, being then unable to speak, he is reminded by the same friend of the transaction of the morning, and the deeds of mortgage and bond securing the monies being produced, he is informed that it is necessary to confirm the gift by a delivery of the deeds; and the friend proposed with the father's permission to hand over the deeds * to his [* 498] daughter. Upon this proposal the father made an inclination of his head, and the friend then handed the deeds across the bed where the father was lying, to the daughter on the opposite side; whereupon the father placed the hand of the daughter upon the deeds, and pressed it with his own hand for some minutes, and appeared satisfied with what he had done. The deeds in question consisted of, 1. A conveyance in fee of lands to secure £2927 with the usual covenant for payment of the money lent, and bond by way of collateral security. 2. An assignment of a mortgage debt of £30,000, and of a judgment for that sum recovered on a bond with a conveyance of the land, and the usual covenant for payment of the money.

Held, that this was a valid *donatio mortis causâ*: that the property in the deeds and the right to recover the money secured by them, passed by the delivery followed by the death of the donor, and that the real and personal representatives of the donor were trustees for the donee, to make the gift effectual.

The original suit in this case was instituted in the Court of Chancery, by the appellants Thomas Duffield, Esquire, and Emily Frances his wife, as plaintiffs, with a view of obtaining the judgment of that Court upon several questions arising out of the

various dispositions made by George Elwes, deceased, of different parts of his property, by way of settlement, gift, and testamentary arrangement; and also for the purpose of placing the infant defendants, the children of the plaintiffs, under the protection of the Court.

The appellant Emily Frances Duffield, was the only child and heir-at-law, and sole next of kin of George Elwes; she intermarried with the appellant, Thomas Duffield, Esquire, in the year 1810. The children of that marriage were five; namely, the respondent George Thomas Warren Hastings Duffield, the only son of the appellants, an infant of the age of eleven years; [* 499] and four daughters, the respondents * Caroline Duffield,

Maria Duffield, Anna Duffield, and Susan Eliza Duffield, all infants, younger than their brother. George Elwes died in 1821, leaving the respondent Amelia Maria Hicks, his widow, who, after the decree pronounced in the original cause, married the respondent the Reverend William Hicks. The respondent Abraham Henry Chambers was the surviving devisee in trust and executor named in the will of George Elwes; the other trustee named in the will having died in the testator's life. The respondent William Hicks was named an executor by George Elwes in a codicil. The respondents Robert Greenhill Russell, and George Spencer Smith were the trustees of the settlement made on the marriage of the respondent William Hicks, and Amelia Maria his wife.

In the month of February, 1810, the appellant Emily Frances Duffield, being then about the age of 18 years, intermarried with the appellant Thomas Duffield, at Gretna in Scotland, without the knowledge of her father, and on the 11th day of March, 1810, the appellants were re-married in England. Shortly after this re-marriage, George Elwes and the respondent Amelia Maria, then his wife, received the appellants into their house, to reside with them as part of their family. George Elwes, at the time of making his will, and until his death, was seised in fee simple of divers freehold and copyhold estates, and was also possessed of a very considerable personal estate. By his will, dated the 1st March 1811, and duly executed and attested to pass freehold estates, after directing that all his debts and funeral expenses, and the expenses of proving his will, should be paid, as thereafter mentioned, and confirming a jointure of £100 per annum, [* 500] and an annuity of £400 to his wife, the * respondent

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Amelia Maria Hicks, he gave and bequeathed unto his dear daughter Amelia Maria Frances Duffield (meaning thereby his daughter the appellant Emily Frances Duffield), the wife of Thomas Duffield, and her assigns, for her life, all that his leasehold messuage or dwelling-house, with the appurtenances, situate in High-street, Mary-le-bone, and he declared that the same should from and after her decease fall into the residue of his personal estate thereafter devised: And he gave and bequeathed unto his said daughter all his carriages, horses, household furniture and goods, plate, linen, china, stock of wines and other liquors, which should be in and about the said messuage or dwelling-house, or in or about any other house or houses in which he might dwell, or which he might inhabit at the time of his decease: And he gave and bequeathed unto his brother John Elwes, since deceased, and to the respondent Abraham Henry Chambers, and their heirs, his freehold and copyhold farm and estate, in Suffolk, and also his freehold farm and estate in Essex, upon certain trusts therein expressed, for the benefit of the second or only son of the appellants, or their daughters in failure of such son, with devises over: And the testator, after giving some legacies of stock and small annuities, and pecuniary legacies, devised and bequeathed the residue of his real and personal estates to the same trustees, upon trust to sell and convert into money all his real estates, mortgages, securities, &c., to hold the monies so produced in trust, among other things, to purchase so much 3 per cent. stock, as would yield £1000 per annum, and to pay the dividends to the appellant his daughter, during her life, for her separate use; the principal at her death to fall into his personal * estate. The residue of the trust fund he disposed of, [* 501] by special limitations, to the children of his daughter, and their children (if any); remainder to John Elwes.

By a codicil dated the 3d March, 1821, he declared the intent of a cancellation which he had made in that part of his will relating to the sale of his freehold, copyhold, and leasehold estates: He devised his real estates to that son of his daughter, who should first attain 21; and appointed the respondent, William Hicks, a trustee in the place of his brother deceased.

The testator, George Elwes, was entitled to the principal sum of £2927 and interest thereon due to him from Sir Edwin Bayntun Sandys, Baronet, secured by the bond of Sir Edwin Bayntun

Sandys, executed by him to the testator, bearing date the 12th day of July, 1820, and further secured by indentures of lease and release and mortgage, bearing date respectively the 11th and 12th of July, 1820, whereby Sir Edwin Bayntun Sandys released and conveyed to the testator in fee simple, by way of mortgage, certain freehold estates. The deed also contained the usual covenant for repayment of the money lent. The testator, George Elwes, was also entitled to the principal sum of £30,000 and interest thereon due to him from Sir Edwin Bayntun Sandys, and secured by certain indentures of lease and release, and assignment of mortgage, bearing date respectively the 2nd and 3rd of November, 1820. The release recited a loan of £30,000 made by trustees under a marriage settlement to Sir Edwin Bayntun Sandys, a conveyance of lands therein described to secure the repayment, a bond executed for the same purpose, and a judgment recovered upon that bond.

[* 502] It * further recited that the mortgagee having called in the money due on the mortgage, George Elwes had advanced to the mortgagee £30,000, in consideration of which the mortgagee, &c., by direction of Sir Edwin Bayntun Sandys, assigned to George Elwes the £30,000 due on the mortgage and also the judgment, and conveyed the lands, &c. This deed also contained the usual covenant for payment of the money lent, on a day specified, with a power to sell the lands mortgaged on failure of payment.

George Elwes, shortly before his death, in conversations held with the respondent William Hicks, frequently declared his purpose to make a further provision for his daughter. He was seized with the illness which ended in his death, on the 1st of September, 1821: on the morning of that day the respondent, William Hicks, proposed to George Elwes to make a gift, *mortis causâ*, to his daughter, of the monies secured by the two mortgages before mentioned, to which proposal, the nature of the gift having been explained to him by Hicks, George Elwes expressly assented. Of this proposal and assent a formal note was drawn up, and signed by Hicks, and two other witnesses. In the evening of the same day, Mr. Hicks, having been informed that an actual delivery of the thing proposed to be given was necessary to the completion of the gift, caused the deeds of mortgage and the bond to be brought from the office of Mr. Law, the solicitor of Mr. Elwes. These deeds were then, in the presence of the same witnesses, produced before the testator, and shown to him, and he was informed by

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Hicks, that the same were the mortgage deeds and bond to secure the principal sums of £2927 and £30,000 and interest due to him from *Sir Edwin Bayntun Sandys, and he was [* 503] reminded by Hicks of what had passed in the morning, and informed that the gift would be unavailing, unless he confirmed it by passing the deeds: and Hicks then proposed, with his permission, to hand over the deeds to his daughter, whereupon he signified his assent by an inclination of his head. The mortgage deeds and bond were then, in the presence and under the eye and observation of George Elwes, handed by Hicks across the bed in which the testator then lay, to the appellant Emily Frances Duffield, and were received by the appellant Emily Frances Duffield, in her hands; and as soon as she had received the mortgage deeds and bond in her hands, George Elwes immediately took hold of her hands, which then contained the deeds and bond, and with both his hands pressed together the hands so holding the deeds and bond, and showed evident marks of satisfaction. During the whole of this transaction, George Elwes, according to the depositions in the cause and the judgment of the witnesses, although he was unable to write or speak, was in a state of mind competent to dispose of his property, and was aware of what he was doing, and that he was thereby making a gift to the appellant Emily Frances Duffield, of the benefit of the bond and mortgages.

On the 2nd of September, 1821, George Elwes died, leaving the respondent Amelia Maria Hicks, then Amelia Maria Elwes, his widow, and the appellant Emily Frances Duffield, his daughter and only child and heir-at-law, and heir according to the custom of the manors whereof his copyhold estates were holden, and also his sole next of kin.

The appellants had, at the death of George Elwes, * five [* 504] children namely, the respondent George Thomas Warren Hastings Duffield, their only son, an infant, and four daughters, infants, namely, the respondents, Caroline Duffield, Maria Duffield, Anna Duffield, and Susan Eliza Duffield.

After the death of George Elwes, the respondent, Abraham Henry Chambers, one of the executors named in his will, and the respondent William Hicks, appointed executor by the codicil, proved his will, and codicil in the Prerogative Court of the Archbishop of Canterbury.

On the 1st of October, 1821. the appellants exhibited their

original bill of complaint in the Court of Chancery (which was afterwards amended), against the respondent Amelia Maria Hicks, by her then name and description of Amelia Maria Elwes, widow, the respondents Abraham Henry Chambers, William Hicks, George Thomas Warren Hastings Duffield, Caroline Duffield, Maria Duffield, Anna Duffield and Susan Eliza Duffield, and others, as defendants, which, among other things stated the substance of the facts before mentioned, and prayed (among other things) that the *donatio mortis causâ* to the appellant Emily Frances Duffield, of the bond and mortgage securities might be established, and that the appellant Emily Frances Duffield, or the appellants in her right, might be declared entitled to the bond and mortgage deeds and to the monies secured thereby, and to all benefit thereof, and that the respondents Abraham Henry Chambers and William Hicks, as executors and trustees of the testator, might be decreed to execute proper instruments to enable the appellant Emily Frances

Duffield, or the appellants in her right, to receive the monies [* 505] due and to become * due on the bond and mortgages respectively, and to obtain the full benefit of the securities; and that the appellants, in her right, might be at liberty to sue in the name of the last named respondents in any action or suit to be brought against the obligor in the bond, and the mortgagor in the mortgages, the appellants thereby offering to indemnify the respondents against all the costs of such action or suit; and that the will and codicil of George Elwes might be established, and the trusts thereof executed, etc.

The adult defendants to the original and amended bill appeared, and put in their answers supporting the claims of the plaintiffs as to the *donatio mortis causâ*. The infant defendants submitted their rights to the care of the Court.

Witnesses were examined in support of the allegations of the bill, and the cause, being at issue, was heard before the VICE-CHANCELLOR on the 17th of April, 1823, when a decree was made by which (among other things) it was declared, that the Court, being of the opinion that a mortgage security cannot by law be given by way of *donatio mortis causâ*, the appellant Emily Frances Duffield was not entitled to the mortgage monies secured by the indentures (of mortgage) and the bond.

In 1824, the widow of George Elwes married the respondent William Hicks, in consequence of which marriage there was a

supplemental suit and a decree in August 1824, to carry on the proceedings.

The declaration of the decree in the original suit, as to the *donatio mortis causâ*, was the subject of the present appeal.

For the appellants.

Mr. Sugden. — The fact of the gifts was not * much ques- [* 506] tioned in the Court below ; the argument was upon the question of law, whether money secured upon a mortgage can be the subject of a *donatio mortis causâ*. That the delivery of a bond on death-bed operates as a gift of the money secured by the bond, has been decided in *Gardner v. Parker*, 3 Madd. 184 (18 R. R. 213), following *Snelgrove v. Bailey*, 3 Atk. 214, where Lord Hardwicke puts the case of an equitable interest in a chattel in possession with a legal title outstanding in a trustee, and says that the gift of the chattel would be valid as a *donatio mortis causâ*. At law a bond cannot be assigned. In the hands of a third party, it can only be made effectual by a power of attorney to sue in the name of the obligee. By the mere delivery of the bond nothing passes but the parchment. But it may operate as a gift of the money, and vest in the donee a right to use the name of the donor, or his representative, as if a power of attorney had been given to enforce the payment of the money. This is the principle of decision in *Gardner v. Parker*, and *Snelgrove v. Bailey*. If a sum of money is secured by bond and mortgage, the money secured is personal property. The real estate is simply a security for payment of the money. That the payment is secured by a mortgage as well as a bond cannot alter the state of the question.

If there is a gift *inter vivos* of money secured by mortgage, the giver (mortgagee) becomes a trustee of the bond by which the debt is secured for the benefit of the donee. If the gift is by will, the heir of the testator becomes a trustee. The Statute of Frauds is out of the question ; for it is a gift of the money secured, and not of the land by which it * is secured. The debt is the [* 507] principal subject, and the real estate being a mere security for the debt, passes as an adjunct to the principal.

The question was agitated in *Hassel v. Tynte*, AmbL. 318, but not decided. Lord HARDWICKE thought the money was the principal, but that there was an interest in land. In the *Duchess of Buccleugh v. Hoare*, 4 Madd. 467, it was held upon a gift of heritable bonds, that the heir was a trustee of the land for the

legatee, and that the money secured passed as part of the personal estate.

The case of *Hurst v. Beach*, 5 Madd. 351 (21 R. R. 304), is not in principle distinguishable from the present case. A gift by the mortgagee to the mortgagor of the money secured was there held good, although secured by real estate, which could not pass without a reconveyance.

The case as to the mortgage for £2927, is more clear, the money being secured by bond as well as mortgage. Suppose the bond alone had been delivered; the money would have passed by the delivery, and the heir of the donor would have been a trustee of the land in mortgage for the donee. The deeds of an estate are a subject of property. The estate will not pass by the mere delivery of the deeds; but having been given they cannot be recovered. In *Snelygrove v. Bailey*, Lord HARDWICKE considered that the money secured passed by the delivery. There was no bond for the £30,000, but the money was secured by an assignment of the debt, by a conveyance of the land, and by a covenant to pay the money. The assignment of the debt existing, and the delivery of the deed of assignment, operates as a gift of the money assigned. In [* 508] the case of a bond * assigned, the assignee may pass the money by delivery of the assignment.

The effect of these nice distinctions is to increase litigation, because no advice can be given in such a state of the law. There is no solid distinction in this respect between a bond and a covenant. The money passed by the delivery in both cases, because they are securities for money, and capable of assignment. The remedy is the same, and the circumstance that there is an additional security by a mortgage of real estate cannot alter the nature of the gift or the remedy; money secured by mortgage may be given by a will without witness; so when there is an existing agreement, the mere delivery of deeds operates as a mortgage. These cases must be considered as excepted out of the Statute of Frauds; otherwise Courts of equity have assumed a power of legislation. Where this depends on contract, the relief goes to the extremity of the jurisdiction. The decisions rest not merely on the ground of contract, but because the act of gift is plain and unequivocal. In this case, how in principle can it affect the right under the inferior securities, that there is also a security of a higher nature?

Mr. Longley. — A mortgage, though in fee and forfeited, still

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continues, in equity, a mere security for money, and belongs to the personal estate of the mortgagee; while the estate in the land remains in equity, and to many purposes at law, in the mortgagor. *Pawlett v. Attorney-General*, Hardr. 469; *Thornborough v. Baker*, 1 Ch. Ca. 283, and from Lord NOTTINGHAM'S notes in 3 Swanston 628; *Noy v. Ellis*, Ch. Ca. 220; *Ellis v. Gravas*, 2 Ch. Ca. 50; *Cope v. Cope*, 2 Salk. 449; *Howell v. Price*, 1 P. Wms. 294.

* In *Chester v. Chester*, 3 P. Wms. 62, Lord Chancellor [*509] KING observes, "An estate, though mortgaged, continues still to be the estate of the mortgagor, subject to the payment of the pledge which is upon it; and the mortgagee's right is only to the money due upon the land, not to the land itself." *King v. King*, 3 P. Wms. 361; *Galton v. Hancock*, 2 Atk. 424, 435.

In *Martin v. Mowlin*, 2 Burr. 969, 978, Lord MANSFIELD says, "A mortgage is a charge upon the lands, and whatever would give the money will carry the estate in the land along with it to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the Statute of Frauds. The assignment of the debt, or forgiving it, will draw the land after it as a consequence. Nay it would do it though the debt were forgiven only by parol; for the right to the land would follow, notwithstanding the Statute of Frauds." *Earl of Tankerville v. Fawcett*, 1 Cox's Rep. 237, 239.

In *Silberschildt v. Schiott*, 3 Ves. & B. 49, Sir WILLIAM GRANT, M.R., says, "If the testator's interest had been really a mortgage, there is no doubt a gift of the money would have carried his interest in the land upon which it was secured."

In *Lord Cholmondeley v. Lord Clinton*, 2 Jac. & W. 179, Sir THOMAS PLUMER, M. R., says, "In the hands of the mortgagee, the mortgage is considered in equity as a mere personal chattel which passes to the executor."

* On the other hand, the equity of redemption con- [*510] stitutes the estate in the land. It is not merely a trust — it is a title in equity. Hardr. 467. It is of such consideration in the eye of the law, that the law takes notice of it and makes it assignable and devisable, Hardr. 469, as Lord HARDWICKE held in *Casburne v. Scarfe*, 2 Jac. & W. 194. An equity of redemption is so completely the estate in the land, or rather the land itself,

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as to be capable of such an adverse possession, as, by length of time, to confer on the adverse possessor an indefeasible title. The *Marquis of Cholmondeley v. Lord Clinton*, Dom. Proc. June, 1821. MSS. [4 Bli. 1, 22 R. R. 84, 99.]

A debt is a *chose in action*; a right to a certain sum of money. This right may be secured in various ways, by record or specialty; or the debt may be allowed to remain due upon simple contract only.

Obligations by specialty comprehend both bonds and covenants for the payment of money. A single bond or bill to pay a sum of money at a day certain, is, in its nature and legal operation, precisely equivalent to a covenant to pay the same sum in the same manner. For, 1st, Each instrument creates a contract or obligation by specialty. It is laid down in *Shepherd's Touchstone*, chap 21, "Of an Obligation," that, "any words in a writing, sealed and delivered, whereby a man doth prove and declare himself to have another man's money, or to be indebted to him, will be a good obligation." As, "Mem., that I, A, of B, do owe

to C, of D, £20, to be paid at Easter next: or, mem., that [* 511] I, A, of B, * do promise to pay C, of D, £20: or mem., that

I, A, of B, will pay to C, of D, £20: or mem., that I, A, of B, have had £20 of the money of C, of D," with many other examples.

2nd. Each instrument binds executors and heirs, if they are named in the instrument.

3rd. A bond, though usually made in the first person, may be made in the third person, Co. Litt. 230. a. And a deed of covenant, though usually made in the third person, may be made in the first person, Litt. Sect. 371, 372.

4th. Actions of debt or of covenant will lie interchangeably on the respective instruments.

"Debt" lies upon every express contract to pay a sum certain, as if a man covenants or grants to pay. Com. Dig. Dett. [A. 8], 1 Leo. 208, 2 Leo. 119. If covenant be to pay rent or other sum at such a day, he may have "debt" or covenant. Com. Dig. Action M. 4 Cro. Eliz. 797. So conversely, covenant will lie on a bond, for it proves an agreement. Per Lord NOTTINGHAM in *Hill v. Carr*, Ch. Ca. 294. Both bond and covenant to pay a sum of money constitute an obligation by specialty to do a personal thing.

The money secured is a personal chattel, which came originally

from the personal estate of the lender, and accrued to the personal estate of the borrower, and is to return from the personal estate of the debtor to that of the creditor; and the securities, whether of bond or covenant, are of a personal nature, being the foundation of personal actions. Since, therefore, the debt secured by mortgage is a personal chattel, though enjoying the benefit of a real security it must follow that the addition of the *personal [* 512] securities of a bond or covenant to the mortgage debt, cannot possibly diminish or alter the personal nature of the debt.

The money secured by mortgage, bond, and covenant, or by mortgage and bond, or by mortgage and covenant, still remains a personal chattel, and the debt, or the right to the money, remains a personal *chose in action*.

A creditor, having both bond and mortgage, may put in force which of the securities he will: he may put by the mortgage and sue only on the bond. *Clarke v. Lord Abingdon*, 17 Ves. 106 (11 R. R. 31).

In many instances it may be most eligible for the holder of both securities to put in force the personal obligation.

Suppose a mortgage and bond given by way of *donatio mortis causá*, and the mortgage be a second mortgage in fee, and the real estate an insufficient security, and swallowed up by the first mortgage, it might be best to sue on the bond. The bond would, in that case, be the only valuable part of the gift.

Or, supposing the debt to be secured by a first mortgage in fee, with a covenant for payment of the money, and the mortgaged premises were destroyed by the accident of fire or flood, then the only security available to the creditor would be the specialty obligation contained in the covenant.

If there be a debt secured by mortgage and bond, or by mortgage and covenant, the assignment of the debt will carry the trust in the mortgaged estate to the assignee. In *Boscille v. Brander*, 1 P. Wms. 458, 460, the question arose, whether the benefit of the *wife's mortgage in fee passed by the [* 513] assignment of the Commissioners under the husband's bankruptcy to the assignees; and Sir J. Jekyll, in delivering his judgment, observes, "There being in the mortgage deed a covenant to pay the mortgage money to the wife, this debt or *chose in action*, was well assigned by the Commissioners to the assignees, and vested in them, like the case of *Miles v. Williams*, 1 P.

Wms. 249, where a bond made to a wife, *dum solu*, was adjudged to be liable to the husband's bankruptcy, and assignable by the Commissioners.

"Wherefore, if the right to the debt was vested in the assignees (as plainly it was), though the legal estate of the inheritance of the lands in mortgage continued in the wife, yet this was not material; it being no more than a trust for the assignees; like the common case, where there is a mortgage in fee, and the mortgagee dies, here the mortgage money belonging to the executors, though the heir takes the legal estate by descent, yet he is but a trustee for the executor; for the trust of the mortgage must follow the property of the debt."

In *Bates v. Dandy*, 2 Atk. 207, Lord Hardwicke held that a husband may dispose of the beneficial interest of his wife's mortgage in fee, as well as of her mortgage for a term.

The definition of a *donatio mortis causâ* is given in the Institutions, Lib. 2, tit. 7, s. 2, in these words: "*Mortis causâ donatio est. quæ propter mortis fit suspicionem: cum quis ita donat, ut si quid humanitûs ei contigisset, haberet is qui accepit; sin autem supervivisset, is qui donavit, reciperet: vel si cum donationis pœnituisse; aut prior decesserit cui donatum sit.*" The [* 514] Emperor then *proceeds to observe, that, "*Hæ mortis causâ donationes ad exemplum legatorum redactæ sunt per omnia: nam cum prudentibus ambiguum fuerat utrum donationis an legati instar eam obtinere oporteret, et utriusque causæ quædam habebat insignia, et alii ad aliud genus eam retrahebant: a nobis constitutum est ut per omnia fere legatis connumeretur, et sic procedat, quemadmodum nostra constitutio eam formavit.*"

A *donatio mortis causâ* has the character of a legacy, by way of contradistinction to a gift *inter vivos*. Cod. lib. 8, t. 57, s. 4.

Everything, which, by the Roman law, might be bequeathed as a legacy by will, might be the subject of a *donatio mortis causâ*. Thus a landed estate might be so given, Dig. lib. 39, tit. 6, s. 14; or a slave, Ibid. 11. 37. 39; or a farm subject to a mortgage, Ibid. s. 18, par. 3; or a simple contract debt, Ibid. s. 18, par. 1, or a part of a debt, Ibid. s. 31, par. 3; or a chirograph or bond for money might be given to a donee *mortis causâ* as a trustee for the obligor, and the beneficial interest in the debt would pass. Ibid. s. 18, par. 2.

The parity of a *donatio mortis causâ* with a legacy is summed

up by Ulpian, in these words: "*Illud generaliter meminisse oportebit donationes mortis causâ factas, legatis comparatas: quodcumque igitur in legatis juris est, id in mortis causâ donationibus erit accipiendum.*" Dig. lib. 49, tit. 6, s. 7. And by Voet in his commentary on the Pandects, lib. 39, tit. 6, s. 7, in the following words: "*Sed et regulariter, quales res, et quibus, et per quos legari possunt etiam mortis causâ rectè donantur.*"

*In *Hedges v. Hedges*, Prec. Cha. 269, Lord Chanc. [*515] COWPER says, "a *donatio mortis causâ* is where a man lies in extremity, or being surprised with sickness, and not having an opportunity of making his will; but lest he should die before he could make it, he gives with his own hands his goods to his friends about him; this, if he dies, shall operate as a legacy; but if he recovers, then does the property thereof revert to him."

In *Ashton v. Dawson and Vincent*, Sel. Cha. Ca. 14, the Lords Commissioners, in their judgment, speaking of a *don. m. c.*, say: "It is not a legacy, nor is there any occasion for the executor's assent to it; it is not a gift at common law, but in view of death; here are express words, but if he had used no words, and had been near death, it had been looked upon as a *donatio mortis causâ*; it is a testamentary legacy, of which the common law takes notice, but not proveable in the Ecclesiastical Court; it is only questionable here; and the executor's assent is not necessary, because he might die intestate."

There must be a delivery to perfect a *don. m. c.* according to the law of England, *Ward v. Turner*, (p. 811, ante,) 2 Ves. sen. 431; but then the delivery is according to the nature of the subject; if it be a small chattel in possession, the chattel itself must be delivered, or at least the key of the trunk or receptacle containing it, *Jones v. Selby*, Prec. Cha. 300; *Bunn v. Markham*, 7 Taunt. 224 (17 R. R. 497); if the gift be of bulky goods the delivery of the key of the warehouse or room containing them is sufficient, *Smith v. Smith*, 2 Stra. 955, 1734; if it be a *choses in action*, a specialty debt, the instrument creating or securing the debt must be delivered. Thus a bond debt, *i. e.*, the equitable interest in the *debt, may pass by way of *donatio mortis* [*516] *causâ*, by delivery of the bond. *Snellgrove v. Bailey*, 3 Atk. 214; *Gardner v. Parker*, 3 Madd. 184 (18 R. R. 213); *Blount v. Burrow*, 4 Bro. C. C. 72, 1 Ves. jun. 546; the benefit of lottery tickets by delivery of the tickets: *Gold v. Rutland*, 1

Eq. Ca. Abr. 346 ; a specie bill by delivery of the bill, *Drury v. Smith*, 1 P. Wms. 404 ; an Exchequer Tally by delivery, or what is tantamount to the delivery of the Tally, *Jones v. Selby*, Prec. Ch. *supra* ; and, as we contend, a mortgage debt by delivery of the mortgage deed, and a specialty debt secured by covenant by delivery of the deed containing the covenant to pay ; there being in each of these cases presupposed an intention to give the debt or *chose in action*.

In *Snellgrove v. Bailey*, 3 Atk. 214, Lord HARDWICKE considers the question to be, not whether a bond can generally be given by way of *donatio inter vivos*, but whether the equitable interest in the bond can properly be made the subject of such a gift as he is treating of, namely, a *donatio mortis causâ*. And he decided in the affirmative.

The question now in litigation is not whether the legal estate in the land may pass by a *donatio inter vivos* of the deeds, as the Vice CHANCELLOR seems to have considered it to be ; but whether the equitable interest in the debt secured by these deeds can pass by a *donatio mortis causâ* of the deeds made with the intention of giving the debt by this legatory disposition.

From Lord HARDWICKE'S doctrine as to the nature of mortgages, and the mode of assigning a mortgage debt laid down in [* 517] *Richards v. Symes*, Barnard. Ch. R. 90, and from * the case of a *donatio mortis causâ* of a mortgage which he puts hypothetically, in *Ward v. Turner*, 2 Ves. sen. 443, we may infer that that learned Judge thought favourably of such a donation, although in *Hassel v. Tynte*, Ambl. 318, he avoided deciding the point.

The benefit of a mortgage security belongs to the personalty of the mortgagee ; the mortgage debt is a *chose in action* due from the personal estate of the mortgagor, and any act of assignment or charge of the debt by any person having authority to assign or charge it, will operate as an assignment or charge *pro tanto*, of the trust of the mortgaged land. *Donationes mortis causâ* have been admitted of money bonds of private persons ; of bonds of the East India Company ; of Exchequer Tallies ; of specie bills ; of lottery tickets. — To ask, therefore, of a Court of Equity to establish a *donatio mortis causâ* made of a mortgage deed, with the intention of giving the debt, is only requiring the Court to pursue its own principles, and to acknowledge and allow this necessary corollary from its doctrines and former decisions.

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The *factum* of the gift is proved by three unexceptionable witnesses to the donor's declaration of giving his property in the mortgages to his daughter, Mrs. Duffield; and three, equally unexceptionable, to the fact of the delivery over of the deeds to the donee, in the donor's presence and by his desire. The gift was of several securities, and where there are several securities for the same debt, an assignment or gift by the creditor of one security is an assignment or gift of the debt, and neither the creditor nor his representatives can be permitted to set up the other security for the purpose of defeating that assignment or gift; but those who hold the legal estate in the *collateral securities be- [*518] come trustees for the assignee or donee of the debt. *Duchess of Buccleugh v. Hoare*, 4 Madd. 476.

The donee is entitled to the bond of 12th July, 1820, and to the benefit of the mortgage and covenant for securing the same debt. The decree, however, has not only denied to Mrs. Duffield the benefit of the deed of covenant and mortgage, but has stripped her of her property in the bond, and is therefore erroneous.

As to the objection founded on the Statute of Frauds, on which of the sections does it rest? Is it the third section, which prohibits an assignment of an interest in land except in writing? That is answered by the consideration that the debt is the principal thing conveyed, and the gift by way of *donatio mortis causâ* of the debt draws after it consequentially the trust of the land, in the same manner as when an assignment for valuable consideration is made by parol, the equitable assignment of the debt draws after it consequentially the trust in the land.

Is it the 5th section which prohibits devises of freehold estate, except by will attested by three witnesses? Our answer is, that a mortgage security is mere personal property in equity; that a bequest of the mortgage money by an unattested will, will pass the mortgage money, and draw after it consequentially the trust of the land pledged for its security.

Is it the 6th section against revocations of wills of land, except by writing attested? Or the 22d section which prohibits revocations of wills of personal estate by word of mouth only? The answer to that is that a will of personalty may unquestionably be revoked, *pro tanto*, by a *donatio mortis causâ* made

* subsequent to the will of the property bequeathed by the [*519] will; and this, notwithstanding the section 22 of this

statute, and a *donatio mortis causâ* of the mortgage is a *donatio mortis causâ* of the equitable right to the money, and does not assume to revoke the devise of the legal estate in the land.

Can it be the 7th or 9th sections, which make void all declarations and assignments of trusts of land, unless made in writing? To these we reply that the *donatio mortis causâ* of the deeds does not assume to convey any interest in the land whatever, by trust or otherwise; but the gift *mortis causâ* of the equitable interest of the debt, made by the delivery of the deeds, will draw after it consequentially the trust or benefit of the security of the landed pledge, as in cases of valid assignment of the debt merely *inter vivos*.

Is it the 19th section which the respondents rely on, which prescribes certain rules for the making of nuncupative wills? This difficulty is removed by observing, that the appellants have never set up this gift as a nuncupative will; but they claim it as a *donatio mortis causâ*, a species of gift sanctioned by a series of authorities in our law, all of them posterior to this Statute of Frauds, which has been supposed to present such obstacles to this kind of legatory disposition.

The deeds themselves belong to Mrs. Duffield, by the gift of her father, and there exists no equity to take them from her.

It is clear, from decided authorities, that a gift even *inter vivos* may be made of deeds. "A man may give or grant his deeds, *i. e.*, the parchment, paper, and wax, to another at his pleasure, and the grantee may keep or cancel them. And, therefore, if a [* 520] man * have an obligation, he may give or grant it away, and so sever the debt and it. So tenant in fee simple may give or grant away the deeds of his land, and the executor in the first instance and the heir in the last hath no remedy." *Shepherd's Touch.* ch. 12, p. 241; *Kelsack v. Nicholson*, Cro. Eliz. 496. Again, "A man may give or grant his deed to another, and such gift by parol is good; and if a man hath an obligation though he cannot grant the thing in action, yet he may grant the deed, viz., the parchment and wax, to another, who may cancel and use the same at his pleasure." Co. Litt. 232, (b).

An heir-at-law is always a favoured character both in Courts of law and equity. An incumbent of a church purchases the inheritance of the advowson and dies, and the dispute being between the heir and the executor who should present to the church, it was adjudged in favour of the heir that all was but as one instant;

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and where these two titles concur in one instant, the heir should be preferred as claiming under the elder right. *Holt v. Bishop of Winchester*, 3 Levinz. 47.

Lord Chancellor MACCLESFIELD says, in *Edwards v. Countess of Warwick*, 2 P. Wms. 176, "I take it to be clear, that if I voluntarily, and without any consideration, covenant to lay out money in a purchase of land, to be settled on me and my heirs, this Court will compel the execution of such contract, though merely voluntary; for, in all cases where it is a measuring cast between an executor and an heir, the latter shall in equity have the preference."

The want of surrender of a copyhold or a defective execution of a power will not be supplied for younger children against an eldest child being the heir *unprovided for, *Cooper v. Cooper*, [*521] 2 Vern. 265; nor for grandchildren in any case. *Kettle v. Townsend*, 1 Salk. 187; *Perry v. Whitehead*, 6 Ves. 544. *A fortiori* there can be no equity in this present case; for grandchildren, amply provided for by their grandfather's will, to diminish the comparatively small provision he has made for his only child and heir-at-law.

Provision for a child is always favoured in equity. *Lord Grey v. Lady Grey*, 1 Ch. Ca. 296, 2 Swan. 594.

For the respondents, the children of Mr. and Mrs. Duffield, — Mr. Heald and Mr. M. West.

Mr. Heald. The evidence as to the delivery is peculiar.

The LORD CHANCELLOR. It does not appear that any thing was read, or any question raised as to the fact of donation. It appears by the report to have been decided purely on the question of law, and that without hearing the counsel for the defendant.

Mr. Sugden. The depositions as to the delivery were read. The case was argued on both sides, and the VICE-CHANCELLOR, expressing doubts on the question, recommended an appeal.

The LORD CHANCELLOR. This should have been noticed in the report.

Mr. Heald. Mr. Hicks, in his deposition, used the word "propose;" but it does not appear that Mr. Elwes was informed what was the amount of the property proposed to be given. This case will form a precedent; and it is of great importance it should be ascertained whether he intended to give the £30,000 or the £2927, or both; for it remains in uncertainty what he intended to give. The evidence is very loose, as purporting to

show a full and perfect delivery, with a knowledge of [* 522] the exact * subject-matter of the gift. In these cases the same evidence should be required, whether the gift is to a child or to a stranger. Would such evidence be held sufficient in the case of a stranger? It goes further than any case in the books. The proposal is made by a third person, and the evidence of assent is by nodding. In the morning Mr. Hicks pressed for an answer, and it was given. But in the evening when they had the deeds, no answer was required, and he was in fact unable to answer. The evidence of Mr. H. Elwes is not very consistent with the other evidence. Probably he has confounded the two meetings. In *Tate v. Hibbert*, 2 Ves. jun. 111 (2 R. R. 175), it was a *donatio inter vivos*.

It can make no difference that a bond is given with the mortgage. The destruction of the deed does not destroy the estate of the mortgagee. To encourage these donations renders property insecure. It is against the policy of the law.

THE LORD CHANCELLOR. Suppose the bond alone is given without the mortgage,—is the mortgage not to pass, if the debt is given by the bond? The VICE-CHANCELLOR spoke to me about this case, and I then thought that there could not be a *donatio mortis causâ* of a mortgage. But now I confess I do not find it easy to maintain the opinion which I then held. Giving the bond must do something or nothing. If it does something, and gives the debt,—will not the mortgage debt follow?

Mr. West. The question is, whether there can be a *donatio mortis causâ* of the beneficial interest in a mortgage, by the delivery of mortgage deeds. It is said that the doctrines and principles relating to gifts of this nature are founded [* 523] upon the civil law; but the Roman * law is admitted in our own law, so far only as it has been received and allowed by our law; the civil law and our law differ in many respects. The civil law required many solemnities, having regard to fraud and influence,—it required five witnesses: ours does not. By the civil law it partook more of the nature of a legacy than a gift; though by the early Roman law, delivery was necessary to perfect the gift; in the time of Justinian, delivery was not necessary. But our law requires delivery. *Irons v. Smallpiece*, 2 B. & Ald. 553 (21 R. R. 395). And it is a general rule that there can be no *donatio mortis causâ* of those things

of which the delivery will not perfect the gift; and those cases which have been determined otherwise are exceptions to the rule, and stand upon very different grounds from the present case.

The delivery of a note not payable to bearer cannot be the subject of a *donatio mortis causâ*, because it is a mere *chose in action*, and must be sued for in the name of the executor. *Miller v. Miller*, 3 P. Wms. 358. Nor can the delivery of receipts for South Sea annuities. (2 Ves. 432.)

The exceptions to the rule are: the case of *Lawson v. Lawson*, 1 P. Wms. 441, where the husband draws a bill upon his goldsmith, payable to his wife, with a direction indorsed upon it, that it should be applied for mourning. This was held to be a good *donatio mortis causâ*; but stress was laid upon its being for mourning, which might operate like a direction given by the testator touching his funeral, which need not be in the will. And on another ground it was held good, as an appointment of the money in the banker's hands; it might likewise have been proved * as a testamentary paper. And of this case [* 524] Lord THURLOW said he did not see the *ratio decidendi*. See *Tate v. Hibbert*, 2 Ves. jun. 120.

Snellgrove v. Bailey, 3 Atk. 213, is the case of a bond, but the reasons which Lord HARDWICKE gives for that determination in *Ward v. Turner*, 2 Ves. 442, are technical and unsatisfactory; and they don't apply to the case of a mortgage: first he says, that some property is conveyed by the delivery; for the person to whom this specialty is given may cancel, burn, and destroy it; the consequence of which is that it puts it in his power to destroy the obligee's power of bringing an action, because no one can bring an action on a bond, without a *profert in curiâ*; but this reason does not apply in respect of a mortgage debt; for an action may be maintained in respect of a mortgage debt, though the deeds are destroyed; and there is no necessity for a *profert in curiâ* of deeds which take effect under the Statute of Uses, because the deeds belong to the grantee to uses; see *Whitfield v. Faussett*, 1 Ves. 394. Another reason Lord HARDWICKE gives, that the law allows it a locality; and therefore a bond is *bona notabilia*, so as to require prerogative administration, where a bond is in one diocese, and goods in another; this reason does not apply to the case of a mortgage debt; and Lord HARDWICKE, probably upon consideration, thought he had gone too far:

for he says in *Ward v. Turner*, "If I went too far in *Snellgrove v. Bailey*, it is not a reason I should go further, and I choose to stop there."

But there is a great difference between a bond and a [* 525] mortgage debt. If a scrivener be entrusted with * the custody of a bond, and he receive the principal, and deliver up the bond, being entrusted with the security itself; it shall be presumed that he is entrusted with a power over it, and with a power to receive the principal and interest; and the rather, because the giving up of the bond upon the payment of the money is a discharge thereof, otherwise if the obligee take away the bond, for then he had no authority to receive any money; but if the scrivener be entrusted with the mortgage deed, not the bond, he hath only authority to receive the interest but not the principal, because the giving up the deed is not sufficient to restore the estate; but there must be a re-conveyance to restore the estate, whereas the giving up a bond in law is an extinguishment of the debt. *Whitlock v. Walham*, 1 Salk. 157.

But then it is said there is no difference between the delivery of mortgage deeds by a mortgagee to the mortgagor; and the delivery of mortgage deeds by the mortgagee to a third person. And it has been decided that by a delivery by a mortgagee to a mortgagor of mortgage deeds, there can be a *donatio mortis causæ* of the mortgage. *Richards v. Syms*, Barnard. 90; *Hurst v. Beech*, 5 Madd. 351 (21 R. R. 304). But there is a great difference where deeds are delivered to a person who has an interest, and a person who has no interest. — And this difference is established both in the civil law and our own law. By the civil law — *Si debitori meo reddiderim cautionem videtur inter nos convenisse non peterem*. So by our own law, delivery of a bond to a debtor is a discharge of the debt. 2 Roll. Abr. 56. But by the delivery of a bond to a third person no presumption arises of a gift to that person, either by the civil law or our own law. A lessee of

tithes cannot grant tithes without deed; yet a parson may [* 526] grant tithes to * him that is to pay them without deed.

Shep. Touch. 230. So common of pasture cannot be granted without deed, but it may be without deed to a person who has land to which common is appurtenant; and in *Hassel v. Tynte*, Ambler, 318 Lord HARDWICKE recognizes the distinction

for, he says, it was a very considerable question whether, by the delivery of mortgage deeds, there be a good *donatio* of the mortgage, and he there says, *Richards v. Syme* was a slight precedent.

This case, therefore, is brought within none of the exceptions, and where such an immense mass of property is invested upon mortgage, it would be dangerous to make a precedent, by which large property might be disposed of upon the testimony of one witness; with none of the checks which the law imposes upon nuncupative wills. I admit that it has been decided both in *Cashburne v. Inglis*, 2 Eq. Ab. 728, 1 Atk. 603, and in various other cases, that the person having the equity of redemption of the mortgage is considered as owner of the land, and the mortgagee is only entitled to retain it as a security for his debt; and that a mortgage in a Court of Equity is only considered as personal assets; but still it is a debt, and only a *chose in action*; and being an incorporeal thing does not pass by the delivery; but then it is said by Mr. Sugden to be like the case of an equitable mortgage where a Court of Equity would compel an actual mortgage to be made, where deeds have been deposited to secure money lent; but of these cases Lord ELDON said in *Ex parte Mountford*, 14 Ves. 606 (9 R. R. 359), that the first determination establishing a mortgage by a deposit of deeds surprised the bar considerably. The present case, however, is different. Here the party comes as a volunteer; the case of an equitable *mortgage rests upon contract and a valuable consideration. [* 527] There are two mortgages in this case; one is a mortgage alone; the other mortgage is secured by a bond; but if there can be no *donatio mortis causâ* of a mortgage, the fact of there having been a bond given can make no difference; the bond is only collateral to the mortgage, and the incident must follow the principal.¹

Mr. Sugden in reply: —

The gift took place in the morning in the absence of the deeds. Gesture is sometimes stronger than words; which may be extorted. In *Gardner v. Parker*, the VICE-CHANCELLOR compelled the executor to lend his name to the donee for the purpose of suing upon the

¹ Mr. Pepys proposed to argue the case for Mr. Chambers; but the LORD CHANCELLOR said, that unless he could show that his client had a distinct interest from the other respondents, he could not be heard.

instrument. This was one step. *The Duchess of Buccleugh v. Hoare* provided another step, where the VICE-CHANCELLOR held that the heir was a trustee to make the heritable bonds effectual for the donee. The fallacy of the judgment is in supposing the claim to be against the donor, whereas it is against his representatives. In mortgages the estate in the land waits on the money. The debt is the principal thing. The land is the incident inseparable from it. When the debt is assigned, the security must follow.

THE EARL OF ELDON.

In the first of these causes there is an appeal from the judgment (1 Sim. & Stu. 244) of the then VICE-CHANCELLOR, the present MASTER OF THE ROLLS, in which he makes this declaration, and from that part of the judgment the present appeal is brought. [* 528] "This * Court doth declare, that this Court being of opinion that a mortgage security cannot by law be given by way of *donatio mortis causâ*, the appellant, Emily Frances Duffield, was not entitled to the mortgage monies secured by the indentures of the 2nd and 3rd of November, 1820, and the bond of 12th July, 1820, and by the indentures of lease and release and mortgage, dated the 11th and 12th of July, 1820."

This judgment, therefore, proceeds upon the expression of an opinion, that a mortgage security cannot by law be given by way of *donatio mortis causâ*; and if it be true that a mortgage security cannot by law be given by way of *donatio mortis causâ*, it certainly then would be unnecessary to inquire whether the mortgage of November, 1820, and the bond of July, 1820, and the indentures of mortgage also of the 11th and 12th July, 1820, have been given by way of *donatio mortis causâ*; because if a mortgage cannot be so given, it is quite unnecessary to consider whether, under the circumstances of this case, it can be held that there was a *donatio mortis causâ*.

Before I proceed to state the opinion which I have formed upon this subject, it is my duty to the learned Judge, from whose judgment this is an appeal, to say, that probably he has been influenced in the opinion which he has expressed by something which had fallen from me in a conversation with him, in which I had certainly expressed very great doubt whether a mortgage could be made the subject of a *donatio mortis causâ*. I consider it just to state that this is so.

The judgment is commenced by the learned Judge in the words

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I am now about to read. "The case of a bond I consider to be an exception and not a rule; property may pass without * writing either as a *donatio mortis causâ*, or by a nuncu- [* 529] pative will according to the forms required by the statute.

The distinction between a *donatio mortis causâ* and a nuncupative will is, that the first is claimed against the executor and the other from the executor. Where delivery will not execute a complete gift *inter vivos*, it cannot create a *donatio mortis causâ*, because it will not prevent the property from vesting in the executors; and as a Court of Equity will not *inter vivos* compel a party to complete his gift, it will not compel an executor to complete the gift of his testator. The delivery of a mortgage cannot pass the property *inter vivos*: first, because the action for the money must still be in the name of the donor; and secondly, because the mortgagor is not compellable to pay the money without having back the mortgaged estate, which can only pass by the deed of the mortgagee, and no Court would compel the donor to complete his gift by executing such a deed. As to the case where a bond accompanied the mortgage deed" (I shall have occasion to state presently the distinction between the two mortgages), "I was at first inclined to think that as the bond alone, if it had been the only security for the debt, would under the decisions have passed as a *donatio mortis causâ*, so it would draw after it the mortgage as being a collateral security for the same debt, — but upon further consideration I think that the delivery of the bond, where there is also a mortgage, cannot be considered as a gift completed. The mortgagor has a right to resist the payment of the bond without a re-conveyance of the estate, and it cannot be maintained that the donor of the bond would be compelled to complete his gift by such re-conveyance."

The principle which is applied in the decision of *this [* 530] case, is the principle upon which Courts of Equity refuse to complete voluntary conveyances. No Court of Equity will compel a completion of them, and throughout the whole of what I have now read, the donor is considered as a party who may refuse to complete the intent he has expressed; but I think that is a misapprehension, because nothing can be more clear than that this *donatio mortis causâ* must be a gift made by a donor in contemplation of the conceived approach of death, — that the title is not complete till he is actually dead, and that the question therefore

never can be what the donor can be compelled to do, but what the donee in the case of a *donatio mortis causâ* can call upon the representatives, real or personal, of that donor to do; the question is this, whether the act of the donor being, as far as the act of the donor itself is to be viewed, complete, the persons who represent that donor (in respect of personalty — the executor, and in respect of realty — the heir-at-law) are not bound to complete that which, as far as the act of the donor is concerned in the question, was incomplete; in other words, where it is the gift of a personal chattel or the gift of a deed which is the subject of the *donatio mortis causâ*, whether, after the death of the individual who made that gift, the executor is not to be considered a trustee for the donee, and whether, on the other hand, if it be a gift affecting the real interest, — and I distinguish now between a security upon land and the land itself, — whether if it be a gift of such an interest in law, the heir-at-law of the testator is not by virtue of the operation of the trust, which is created not by indenture but a bequest arising from operation of law, a trustee for that donee. I [* 531] apprehend that really the question does not turn at * all upon what the donor could do, or what the donor could not do; but if it was a good *donatio mortis causâ*, what the donee of that donor could call upon the representatives of the donor to do after the death of that donor.

With respect to the question of fact, whether those mortgages and the bond were or were not given in such a manner as constituted a good *donatio mortis causâ*, if there be no objection to the fact, that the subject of the mortgage was an interest in real estate, I do not apprehend that the gentlemen at the bar, though they criticised very much the nature of the evidence which has been given, meant to ask for any issue to try whether there was or was not a good *donatio mortis causâ*, if a mortgage can be the subject of a *donatio mortis causâ*. In some of the cases which I shall have occasion to mention, it will be seen that where there is any doubt whether in point of fact there was that which would constitute a good *donatio mortis causâ*, if in point of law the subject of it can be made the subject of a *donatio mortis causâ*, it is a very familiar thing to direct an issue or issues to try that fact. That not having been desired, the case is to be considered on its merits. Supposing the testator to have the power, has he fallen into a mistake with respect to the subject which he did intend so to give, and has he attempted to

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make a good *donatio mortis causâ* of property which he could not so transfer?

It is necessary to state, first, what these two mortgages are, for they differ in their nature. The first is a mortgage for a sum of between £2000 and £3000, and there is the usual bond. The other is the case of an interest conveyed by indentures of lease and release and assignment, the contents of * which [*532] are such as I am about to state. There being property considerably more than £30,000 vested in trustees under a marriage settlement, they have advanced £30,000 to Sir Edwin Bayntun Sandys upon a mortgage of his estates and a bond, and judgment recovered upon that bond. The person who is supposed to have made this gift *causâ mortis* afterwards advanced to the mortgagee that sum of £30,000, the mortgagor joining in the trust assignment of the mortgage. There was first an assignment of the money, the £30,000; secondly, an assignment of the judgment; and, thirdly, it contained a covenant to pay the money secured by the mortgage, which covenant formed a species of debt affecting the inheritance, — the subject of the assignment to Mr. Elwes.

It appears that Mr. Elwes had been extremely angry with his daughter, who had married Mr. Duffield; but towards the close of life, and particularly when he came very near his death, he became very desirous to make a larger provision for his daughter; and, accordingly, in a conversation which he had upon the subject, he mentioned that there were these mortgages, one of two thousand odd hundred pounds, and another of thirty thousand pounds. Nobody, I think, who looks to the evidence, can doubt that it was his intention to make a gift of those mortgages for the benefit of that daughter whom he had restored to his favour, and, accordingly, he stated his purpose. He died the next morning. He was at the time in circumstances in which, it is clear, he apprehended that his death was approaching, and being extremely desirous to make some provision for his daughter, in the course of that morning he stated an intention upon the subject, which could leave no doubt in the mind * of anybody what that intention was. It [*533] occurred afterwards that a declaration of this purpose should be made, and the question is, whether the form of that declaration was sufficient to constitute a gift of the property? There was no time to draw out a regular transfer of the property, but in the course of the morning there were brought to him the

instruments, — the mortgages, the bonds, and so on; and it being suggested that it was necessary, in order to make a good *donatio mortis causâ*, that there should be delivery of the instruments, subject to the question, whether such delivery constituted a good *donatio mortis causâ*; it appears by the evidence of the gentleman who had all these instruments in his hand, that Mr. Elwes took the hand of his daughter and laid it upon these instruments. The evidence presents an accurate account of the clear manifestation of his purpose to give, although that manifestation was accompanied with this circumstance, — that he was so near the termination of his life, and so reduced, that he could hardly utter the words, but that it was more by a look than a word that he expressed his approbation of what was done. This was therefore a case where one cannot help feeling a very strong wish that it should take effect; but, it must be remembered, we cannot give that effect unless the law enables us to do it.

Improvements in the law, or some things which have been considered improvements, have been lately proposed; and if, among those things called improvements, this *donatio mortis causâ* was struck out of our law altogether, it would be quite as well; but that not being so, we must examine into the subject of it.

I apprehend that the question is not a question between the donor and donee, but that the question is, whether the act [* 534] is complete to this extent, — that the *donor gave this in such a manner as to constitute a good *donatio mortis causâ*, which will bind the interest in the executor as to the personal estate, and bind the interest in the heir-at-law with respect to the mortgage security as to the real estate? Because, I apprehend, that in a case where a *donatio mortis causâ* has been carried into effect by a Court of Equity, that Court of Equity has not considered the interest as vested by the gift, but that the interest is so vested in the donee, that that donee has a right to call on a Court of Equity, and, as to the personal estate, to compel the executor to carry into effect the intention manifested by the person he represents. The only authority it will be necessary to cite for that doctrine is referred to in this decision. The case of *Gardner v. Parker*, 3 Madd. 184 (18 R. R. 213), is a decision by the same Judge, and was under these circumstances: It was a gift of a bond by delivering the same and saying, "There, take that and keep it," in the last sickness of the donor, — the donor dying two

days afterwards. This was held to be a *donatio mortis causâ*, and it was directed that the donee should be at liberty to use the executors' names in suing on the bond, he indemnifying them, and the costs of the suit to be paid out of the testator's estate, which is founded on this reason, that the money may be recovered in a proceeding at law, by an action in the name of the executors; but if the executors refuse to permit their names to be used, a Court of Equity will compel them to permit their names to be used in consequence of the trust which arises from the act of the donor himself.

In another case of *Snellgrove v. Bailey*, 3 Atk. 214, “bond for £100 was given by one Sparkman to Sarah *Bailey, [*535] which Sarah Bailey delivered to the defendant, saying, ‘In case I die, it is yours, and you will have something.’ The plaintiff, as administrator to Sarah Bailey, brought a bill to have the bond delivered up.” There was a question whether there had been a *donatio causâ mortis*, and the administrator there brought a bill to have the bond delivered up, as being in the hands of the alleged donee. Lord HARDWICKE, however, decided, that this was a sufficient *donatio causâ mortis* to pass the equitable interest, not the legal interest in the bond, upon the intestate's death. I find that Lord HARDWICKE, in the case where there was a gift in the nature of a *donatio mortis causâ*, directed that the representatives should be at liberty to file a bill to have the deeds delivered up, although he said they might bring trover for the deeds: but if the act of the donor had vested the deeds in the hands of the person in such a manner as to give an interest in the nature of a *donatio mortis causâ*, there could be no equity to obtain the delivery up of those deeds unless the title had been settled at law.

The real question in this case is not, whether this was good as a *donatio causâ mortis*, if the subject of delivery had been a bond alone, but whether the subject of delivery being mortgages, that is, estates in land in one sense of the word, such interests in land as those are can or cannot be made the subject of a *donatio causâ mortis*? — A question which is left in a state of great uncertainty, — a question noticed in some cases, but still left in a state of great difficulty; and I cannot but extremely lament that there should have been a decision upon a question of this importance with so little said either in argument or judgment upon the bearings of the cases to be found * with reference to this [*536]

subject. Upon looking into the cases, I observe that in the very first case I can find Lord HARDWICKE to have decided, he expressed more doubt upon the subject than, in my humble judgment, speaking with great deference when looking at that great man's authority, former decisions upon the subject would have induced me to expect to find in his Lordship's expressions.

In the case of *Hussel v. Tynte*, Ambl. Rep. 318, in which a lady claimed to have a sum of £1000 secured by mortgage, which she said she had become entitled to by a *donatio causâ mortis* made by the donor (the testator is a wrong term in such a case) — there were two questions, one was a question of fact, namely, whether the circumstances were such as to constitute it a gift, if it was a proper subject of gift? The other, whether it was a proper subject of gift? Lord HARDWICKE expressed a doubt whether a mortgage deed could be made the subject of a *donatio causâ mortis*, and he finished the case by saying, "I observe that this lady, when she becomes twenty-one, is to be the residuary legatee of the testator, and as she will very soon attain the age of twenty-one, I will not keep up this controversy between her as claiming this £1000 and the person entitled to the residue if she dies under twenty-one; the probability is she will arrive at the age of twenty-one, and then, as residuary legatee, she will be entitled to all the residue, and then it will become unnecessary to determine whether this £1000 shall be settled upon her or not."

In the case of *Ward v. Turner*, 2 Ves. sen. 431, which is a leading case upon this subject, Lord HARDWICKE entered into a [* 537] very long consideration of the case in his judgment. *The question there was, whether some receipts for stock having been delivered over, it was a good *donatio causâ mortis*? He was of opinion it was not; that the mere certificate of the stock was not a document of the title, and where no document of the title has been delivered there can be no transfer of the property, and he held that that was not a good *donatio causâ mortis*.

In *Richards v. Symes*, 2 Atk. 319, 3 Barnard. 90, and 2 Eq. Ca. Abr. 617, Lord HARDWICKE is represented as having decided, that if a mortgagee gave to his mortgagor the deeds of the mortgage, and that fact was proved, that was a gift of the money for which the deeds were a security, and not within the Statute of Frauds. Now the whole, or the greater part of the difficulty in determining whether the gift of a mortgage can be a good *donatio causâ mortis*,

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turns upon this, — that the question arises how far the Statute of Frauds will allow of that. Lord HARDWICKE was of opinion, according to this case of *Richards v. Symes*, that if a mortgagee gave to a mortgagor the deeds, the Statute of Frauds would not stand in the way; he held clearly that the mortgagee cannot get back the deeds from the mortgagor; then he said that the documents, the deeds being in the hands of the mortgagor, though the estate in the land was still in the mortgagee, yet by operation of law a trust would be created in the mortgagee to make good a gift of the debt to the mortgagor, to whom he had delivered the deeds, as the evidence that he forgave the debt and gave it up. We must consider the difference between the actual estate and a mortgage, — and recollect that although a mortgage vests an estate in land, (a fee simple mortgage of course vests * a fee simple estate in [* 538] land), yet it may be represented that there are two estates, one in the mortgagor and another in the mortgagee. A mortgage, for instance, does not revoke the will of the testator. A mortgage does not give dower, — it is, in truth, nothing more than a pledge, and if the right to the principal is divested out of the mortgagee by a valid act to divest the right of the principal, the other is considered as what they call an accident, and then the question arises — not whether the land can be got out of the mortgagee without a conveyance, but whether, if the land is to be considered as still remaining vested in the mortgagee, he is not, by operation of law, a trustee for the mortgagor, bound to answer the subpoena of that mortgagor to reconvey the estate to him, and to execute the requisites of the Statute of Frauds.

In the case of *Hassel v. Tynte*, Lord HARDWICKE makes the observation in giving his judgment, — that the case of *Richards v. Symes* was not a precedent of very considerable value; because, he says, that he had directed issues to try whether there was a gift by the mortgagee to the mortgagor, and those issues having ended in deciding that there was not, he considered that a precedent of very little authority. I consider it, however, as a precedent of very considerable authority in such a case as this. It is reported at length in Barnardiston's Chancery Cases, and when I mention that reporter, I am sorry to have to add, that I am old enough to remember Lord MANSFIELD, who practised under Lord HARDWICKE, by whom all these cases were decided, state his opinion of these reports, for he knew the man. I take the liberty of saying, that

in that book there are reports of very great authority. [*539] The case happens to be reported likewise in *another book of no very high character. I mean the second volume of the Equity Cases abridged. It is not so high in character as the first volume of the Equity Cases abridged; but the case as there reported, is reported from a manuscript note, and from a manuscript note which I think is better entitled to credit for this reason; that having called in assistance in this case (which I believe will be the first absolute determination upon the subject, though I think there is a great deal laid down in the cases which ought to lead us to decide what ought to be a good *donatio mortis causâ*), I have found authority to consider that report to be a very correct report, in the library and in the mind, which are both equally large storehouses of equity learning, — I mean the library and mind of Lord REDESDALE. Upon this occasion, he has had the goodness to hunt through all the books he has upon the subject, as well manuscript as printed, and I come to the foundation of my opinion, with all the assistance I can have from that quarter.

According to both the reports, an issue had been directed. If there had been a good delivery, Lord HARDWICKE seems to consider that the interest in the land would have passed: "But in all these cases," he says, "there is a difference, both at law and in equity, between absolute estates in fee or for a term of years, and conditional estates for security of money. In the case of absolute estates, it cannot be admitted that parol proof of the gift of deeds shall convey the land itself. But where a mortgage is made of an estate, that is only considered as a security for the money due, the land is the accident attending upon the other (and principal object), "and when the debt is discharged the interest in [*540] the land follows of course." A trust *of the land then arises by operation of law: when a deed is given a trust also arises by operation of law. "At law, the interest in the land is thereby defeated, and in equity a trust arises for the benefit of the mortgagor:" and his Lordship said, that "if an obligee delivers up a bond with intent to discharge the debt, the debt will certainly be thereby discharged, and the mortgage with it;" and if the bond is discharged in the present case, it is very difficult to say that the mortgage debt, as debt, will not be discharged also.

In reasoning the case of *Ward v. Turner*, and pointing out the

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distinction there is between the delivery of a mere chattel, and the delivery of any thing which forms part of the title, Lord HARDWICKE says this, — and I find by a manuscript note in the possession of the noble Lord I have mentioned, that this is exceedingly correct: “Suppose it had been a mortgage in question, and a separate receipt had been taken for the mortgage money, not on the back of the deed (which was a very common way formerly, and is frequently seen in the evidence of ancient titles), and the mortgagee had delivered over this separate receipt for the consideration money, that would not have been a good delivery of the possession, nor given the mortgage *mortis causâ*, by force of the act.” (2 Ves. 443.) To be sure, that reasoning is quite idle, unless Lord HARDWICKE meant to say that delivery of the deed, with a receipt upon the back of it, not by force of the delivery of the receipt on the back of it, but by force of the delivery of the deed, would be a good *donatio causâ mortis*.

The case of *Richards v. Symes* was argued by Lord MANSFIELD, then Mr. Murray. The case of *Ward v. Turner* was also argued by Lord MANSFIELD, * then Mr. Murray; and he [*541] appears to have a strong recollection of it, when he got into the Court of King’s Bench, where sometimes equity has been rather more misunderstood than it ought to be, which has perhaps led some men belonging to that Court to abuse equity, when they knew nothing about the matter. There is a case in the second volume of Burrows’ Reports, *Martin v. Moulin*, 2 Burr, 979, — a case of very great importance, — a case in which a man devised lands: the will, I think, was not attested by three witnesses, but he described the object of his devise of land. There was enough in his will to show that he meant to pass the personal interest in his property, and it was a question, whether there was a good devise of the mortgage or not. The land itself could not be said to be devised; but the Court of King’s Bench held that it was a very good bequest of the personal interest: and Lord MANSFIELD, in summing up all this sort of doctrine, says: “A mortgage is a charge upon the land, and whatever would pass the money will carry the estate in the land along with it to every purpose.” (That I admit is equity.) “The estate in the land is the same thing as the money due upon it — it will be liable to debts — it will go to executors — it will pass by a will not made and executed with the solemnities required by the Statute of Frauds. The assignment of

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the debt or forgiving it will draw the land after it as a consequence : nay, it would do it, though the debt were forgiven only by parol, for the right to the land would follow notwithstanding the Statute of Frauds."

I ought to do it in a spirit of great humility, when I question the doctrine of Lord MANSFIELD. If he meant by that to [*542] say that such acts done with the * money will have the effect in a Court of Equity of enabling you to call for a conveyance of land, I am ready to agree with him ; but to say that the land is to be considered as passing under such circumstances, is that to which I cannot agree ; but still I maintain that the doctrine from first to last is correct, provided you lay the foundation in the intent of the gift, that the debt is well given or well forgiven ; and then, as the result of that interest so given, you say that the party who has the land becomes in equity a trustee for the person entitled to the money and to the personal estate.

Lord HARDWICKE, with respect to the bond (and it is necessary that I should take some notice of this, because there has been a change in the law which that great Judge did not foresee, but which, in later times, and in my own time, has become very familiar in the Courts of Law,) — Lord HARDWICKE states, as one ground of his opinion in the case of the bond, that it is a good gift *causâ mortis*, because he says he who has got the bond may do what he pleases with it. He certainly disables the person who has not got the bond from bringing an action upon it : for, says Lord HARDWICKE, no man ever heard — (and I have seen in the manuscript of the same Lord HARDWICKE, that he said no man ever will hear) — that a person shall bring an action upon a bond without the *profert* of that bond ; but we have now got into a practice of sliding from Courts of Equity into Courts of Law, the doctrine respecting lost instruments ; and I take the liberty most humbly of saying, that when that doctrine was so transplanted, it was transplanted upon the idea, that the thing might be as well conducted in a Court of

Law as in a Court of Equity, — a doctrine which cannot [*543] be held by any person who knows what * the doctrine of Courts of Equity is as to a lost instrument.

Then, if the delivery of a bond would, as it is admitted, (notwithstanding any change in the doctrine about *profert*), — if the delivery of a bond would give the debt in that bond, so as to secure to the donee of that bond the debt so given by the delivery of the

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bond, the question is, whether the person having got, by the delivery of that bond, a right to call upon the executor to make his title by suing or giving him authority to sue upon the bond, what are we to do with the other securities if they are not given up? But there is another question to which an answer is to be given: What are we to do with respect to the other securities, if they are delivered? In the one case, the bond and mortgage are delivered; in the other the judgment, which is to be considered on the same ground as a specialty, is delivered, — with that, the evidences of the debts are all delivered. The instrument containing the covenant to pay is delivered. They are all delivered in such a way that the donor could never have got the deeds back again. Then the question is, whether, regard being had to what is the nature of a mortgage, contradistinguishing it from an estate in land, those circumstances do not as effectually give the property in the debt as if the debt was secured by a bond only?

The opinion which I have formed is, that this is a good *donatio mortis causâ*, raising by operation of law a trust; a trust which being raised by operation of law is not within the Statute of Frauds, but a trust which a Court of Equity will execute; and therefore, in my humble judgment, this declaration must be altered by stating that this lady, the daughter, is entitled to the benefit of these securities, and with a *direction to the [*544] Court of Equity to proceed in the cause, on the ground of the principle to be found in such a declaration to be made by your Lordships, which, with respect to that part of the case, I take the liberty to advise your Lordships to adopt.

Ordered and adjudged by the Lords spiritual and temporal in Parliament assembled, that the said decree of the Court of Chancery of the 17th April, 1823, be, and the same is hereby reversed, in so far as it declares, “That the said Court being of opinion that a mortgage security cannot by law be given by way of *donatio mortis causâ*, the plaintiff, Emily Frances Duffield, is not entitled to the mortgage monies secured by the indentures of the 2nd and 3rd days of November, 1820, and the said bond of the 12th day of July, 1820, and by the said indentures of lease and release and mortgage dated the 11th and 12th days of July, 1820.” And it is further ordered, that the said cause be referred back to the Court of Chancery, to proceed therein in such manner as shall be consistent with this judgment.

ENGLISH NOTES.

To a *donatio mortis causâ* it is essential that the transaction should be in contemplation of death and intended to take effect only after the donor's decease. An instrument purporting to be an absolute and immediate assignment of a bond, which was incomplete and ineffectual as a gift *inter vivos*, has been held incapable of taking effect as a *donatio mortis causâ*, because the terms of the instrument contradicted this essential intention; so that although the bond was delivered to the donee with such an instrument indorsed on it, the donee acquired no property in the bond. *Edwards v. Jones* (1836), 1 My. & Cr. 226. On the other hand, if there is a complete legal transfer of shares so that, in point of form, the transaction would be valid as a gift *inter vivos*, it is competent to show *aliunde* the intention to be a *donatio mortis causâ*; and the donee having recovered and become a lunatic, his committee was held entitled to revoke the gift and to have the donee declared a trustee and ordered to retransfer the shares. *Staniland v. Willott* (1850), 3 MacN. & G. 664.

If the donor enjoys the benefit of the property, as by receiving interest, after the transaction relied upon as a gift, it cannot be supported as a *donatio mortis causâ*, since the subsequent enjoyment of the benefit is inconsistent with the condition that the gift is made in the immediate contemplation of death. *Gason v. Rich* (1887), 19 L. R. Ir. 391.

A *donatio mortis causâ* may be good although coupled with a trust. *Hills v. Hills* (1841), 8 M. & W. 401; *Bouts v. Ellis* (1853), 17 Beav. 121.

The decision in *Ward v. Turner* was followed by Vice-Chancellor HALL in *Moore v. Moore* (1874), L. R., 18 Eq. 474, where he held that the delivery of certificates of railway stock could not constitute a good *donatio mortis causâ*.

In *Witt v. Amiss* (1861), 1 Best & Sm. 109, 30 L. J. Q. B. 318, it was decided by the Queen's Bench that a policy of life insurance might be the subject of *donatio mortis causâ* by delivery of the policy and verbal expression of the intention. The effect of the judgment was confirmed by Sir J. ROMILLY, M. R., in *Amiss v. Witt* (1864), 33 Beav. 619.

The cases relating to *donatio mortis causâ* by means of a cheque require special attention.

By the Bills of Exchange Act, 1882, s. 75, "the duty and authority of a banker to pay a cheque drawn on him by his customer are determined by . . . (2) Notice of the customer's death." By the common law it would have been more correct to say that the authority is determined by the death; but the bank by acting upon the ostensible authority without notice of the death, are entitled as against the cus-

torner's estate to be put in the same position as if the authority had been subsisting. *Rogerson v. Ludbrooke* (1822), 1 Bing. 93.

Consequently, if a cheque drawn in the ordinary way is delivered by the drawer to a person who retains the cheque in his possession until after the death of the drawer, he has no right of action against the drawer's representatives; nor can the transaction in any way be made effectual as a gift. *Tate v. Hilbert* (1793), 2 Ves. Jr. 111, 2 R. R. 175; *Hewitt v. Kage* (1868), L. R., 6 Eq. 198, 37 L. J. Ch. 632. And it makes no difference if the gift of the cheque is accompanied by delivery of the donor's pass-book (which is merely a copy of the customer's account in the bank ledger and, at most, *prima facie* evidence against the banker of the state of the account). *Beak v. Beak* (1872), L. R., 13 Eq. 489, 41 L. J. Ch. 470. But if, in the lifetime of the donor, or before notice of the death, the donee negotiates the cheque for value, or obtains payment from the bank, the gift is validated. *Tate v. Hilbert*, 2 Ves. Jr. at p. 118; *Rolls v. Pearce* (1877), 5 Ch. D. 730. It is true that in the last-mentioned case, Vice-Chancellor MALINS lays stress on the circumstance that the cheque was drawn to the donee's order and indorsed by her. But it is difficult to see how it could have made any difference if the cheque had been drawn to bearer, since by negotiating the cheque for value (and payment to the donee's own bankers, and their placing the amount to her credit, is a transaction for value — see 3 R. C. p. 760) she must have made herself liable to the bank for the amount, whether she endorsed the cheque or not.

But where the holder of a bill or note upon which a third person is liable to him delivers it with the intention of making a gift *mortis causæ*, that is effectual; and although the bill or note was payable to the order of the donor and he had not indorsed it, the property in equity passes to the donee. *Miller v. Miller* (1735), 3 P. Wms. 356; *Veal v. Veal* (1859), 27 Beav. 303, 29 L. J. Ch. 321; *In re Mead*, *Austin v. Mead* (1880), 15 Ch. D. 651, 50 L. J. Ch. 30; *Clement v. Cheesman* (1884), 27 Ch. D. 631, 54 L. J. Ch. 158, 33 W. R. 40.

The same principle has been applied to the deposit note of a bank, containing a formal acknowledgment of the receipt of money and an engagement by the bank to repay the same with interest, and being in terms which imply that the production of the receipt with an order endorsed on it by the depositor is necessary to obtain payment of either principal or interest. There had been several decisions by Courts of first instance to the effect that such an instrument was a good subject of *donatio mortis causæ* by delivery, particularly the decision of Vice-Chancellor KNIGHT BRUCE in *Moore v. Darton* (1851), 4 DeG. & Sm. 517, 20 L. J. Ch. 626; and ultimately the point came up for decision by the Court of Appeal in *Re Dillon*, *Duffin v. Dillon* (14 Feb., 1890),

44 Ch. D. 76, 59 L. J. Ch. 420. There, on a review of the cases, it was decided that the delivery of such a receipt by the depositor with the intention of making a gift of the money, and on the understanding that the note should be given back in case of recovery, was a good *donatio mortis causâ*. The donor had in fact filled up and signed the order on the back of the receipt, so that it read: —

“To the London and Westminster Bank — Lambeth Branch.

Pay to self or bearer [bearer]

£580 — *Five hundred and eighty pounds and interest.*

J. Dillon.”

But the Court considered the filling up and signing of the order to be immaterial, except in so far as it assisted in showing the intention of the transaction. The order did not effect a complete transfer of the debt, nor would it have made the donor himself a trustee, so as to give effect to the transaction as a gift *inter vivos*. But the delivery of the instrument with the intention as proved in the case was, upon the principle of Lord ELDON’S decision in *Duffield v. Elwes*, a good *donatio mortis causâ* making the representatives of the donor trustees for the donee for the purpose of giving effect to the gift. In giving judgment, COTTON, L. J., says (44 Ch. D. at p. 82): “The case of *Moore v. Darton* (*supra*) is very instructive as to the class of instruments which are subjects of *donatio mortis causâ*. There a document was executed when a deposit of money was made. The mere fact of the deposit would create a debt; but the document, besides acknowledging the receipt of the money, expressed the terms on which it was held, and showed what the contract between the parties was. It was held that the delivery of that document was a good *donatio mortis causâ* of the money deposited, and so, in my opinion, was the delivery of the deposit note in the present case.” In his judgment in the same case LINDLEY, L. J., incidentally observes that the doctrine that a man cannot make a good *donatio mortis causâ* by a gift of his own cheque may some day require consideration.

The donor may during his life revoke a donation *mortis causâ*, *Bunn v. Markham*, 7 Taunt. 224 at p. 232, 17 R. R. 497 at p. 503–4; but he cannot revoke it by his will, *Jones v. Selby*, Prec. Ch. 304. A *donatio mortis causâ* is liable to the donor’s debts, *Ward v. Turner* (the former principal case, *ante*, at p. 815, 2 Ves. Senr. at p. 434); and is subject to legacy duty under 8 & 9 Vic. c. 76, s. 4; and also to stamp duty under 44 & 45 Vic. c. 12, s. 38.

AMERICAN NOTES.

Both principal cases are repeatedly cited by Mr. Thornton, the American writer on Gifts and Advancements. The general doctrine of the Rule as to the necessity of delivery is uniformly accepted in this country. As to what constitutes delivery however there is some conflict of opinion, and so in respect to stocks.

"To constitute a *donatio causâ mortis*, there must be three attributes: (1) the gift must be made with a view of the donor's death; (2) it must be subject to the condition that it shall take effect only on the donor's death by his existing illness; and (3) there must be a delivery of the subject of the donation:" *Kenistons v. Sceva*, 54 New Hampshire, 24, 37. See *Henschel v. Maurer*, 69 Wisconsin, 576; *Michener v. Dale*, 23 Pennsylvania State, 59; *Taylor v. Henry*, 48 Maryland, 550; 30 Am. Rep. 486; *Conser v. Snowden*, 54 Maryland, 175; 39 Am. Rep. 368; *Willemin v. Dunn*, 93 Illinois, 511; *Ridden v. Thrall*, 125 New York, 572; 21 Am. St. Rep. 758; *Kiff v. Weaver*, 94 North Carolina, 274; 55 Am. Rep. 601; *Drew v. Haggerty*, 81 Maine, 231; *Vandor v. Roach*, 73 California, 614; *Kilby v. Godwin*, 2 Delaware Chancery, 61; *Trenholm v. Morgan*, 28 South Carolina, 268; *Dickeshied v. Exchange Bank*, 28 West Virginia, 340; *Gano v. Fisk*, 43 Ohio State, 462; *Emery v. Clough*, 63 New Hampshire, 552; *Priester v. Priester*, Richardson Equity Cases (So. Car.), 26; 23 Am. Dec. 191; *Holley v. Adams*, 16 Vermont, 206; 42 Am. Dec. 508; *Grymes v. Hone*, 49 New York, 17; 10 Am. Rep. 313.

Evidences of debt, such as bonds or notes and mortgages, and promissory notes and checks of third persons, pass by delivery and carry the debt, even though the indorsement of the donor is lacking. Mr Thornton says (p. 234): "The old cases hold unqualifiedly that a note payable to the order of the payee, unindorsed by him, or if indorsed by him to a particular person, unindorsed by the indorsee, cannot be made the subject of a gift *inter vivos* or *donatio mortis causâ*. . . . A number of early cases hold to this rule." Citing *Ward v. Turner*. "But at an early date this doctrine was much shaken, and the decision then finally rendered became the rule of decision in England." Citing *Snellgrove v. Bailey*, 3 Atk. 314. "The question was virtually put to rest by a decision of the House of Lords in 1827" (*Duffield v. Elwes*), "though the legitimate deduction to be made from that case does not seem to have been acquiesced in until 1859," citing *Veal v. Veal*, 27 Beav. 303. The American doctrine was declared in 1837, in Massachusetts, in *Grover v. Grover*, 24 Pickering, 261; 35 Am. Dec. 319, and is sustained by *Borneman v. Südlinger*, 15 Maine, 429; *Trowbridge v. Holden*, 58 *ibid.* 117; *Stephenson's Adm'r v. King*, 81 Kentucky, 425; *Hill v. Sheibley*, 64 Georgia, 529; *Druke v. Heiken*, 61 California, 346; 44 Am. Rep. 553; *Walker v. Crews*, 73 Alabama, 412; *Elam v. Keen*, 4 Leigh (Virginia), 333; 26 Am. Dec. 322; *Ellis v. Secor*, 31 Michigan, 185; 18 Am. Rep. 178; *Trenholm v. Morgan*, 28 South Carolina, 268; *Kiff v. Weaver*, 94 North Carolina, 274; 55 Am. Rep. 601; *Brown v. Brown*, 18 Connecticut, 410, 46 Am. Dec. 328; *Camp's Appeal*, 36 *ibid.* 88; 4 Am. Rep. 39; *Westerlo v. DeWitt*, 36 New York, 341; 93 Am. Dec. 517; *Gourley v. Linsenbighler*, 51 Pennsylvania State, 345; *Donnell v. Donnell*, 1

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Head (Tennessee), 267; *Purdham v. Murray*, 9 Ontario Appeals, 369; *Erec'rs of Egerton v. Egerton*, 17 New Jersey Equity, 419; *Stewart v. Hidden*, 13 Minnesota, 43; *Kenistons v. Seera*, 54 New Hampshire, 21; *White v. Callinan*, 19 Indiana, 43; *Basket v. Hassell*, 107 United States, 602; 108 *ibid.* 267; *Martin v. Smith*, 25 West Virginia, 579.

It is held in some of these cases, and it is the general doctrine that the gift of a note made by the donor himself is not effectual inasmuch as it is a mere promise, *Holley v. Adams*, 16 Vermont, 206; 42 Am. Dec. 508; but the destruction by a creditor of the notes of a debtor, with a declaration that in case of her death he should not be compelled to pay them, is a valid *donatio causâ mortis*: *Durland v. Taylor*, 52 Iowa, 503; 35 Am. Rep. 285, citing *Gardner v. Gardner*, 22 Wendell (New York), 526; 34 Am. Dec. 340; *Blasdel v. Locke*, 52 New Hampshire, 238. So of a surrender of the maker's note to him. *Stewart v. Hidden*, 13 Minnesota, 43. An unaccepted draft does not pass by such delivery. *Harris v. Clark*, 3 New York, 93; 51 Am. Dec. 352.

Delivery of a savings bank pass-book with an assignment of the deposit, or even without an assignment, is a valid *donatio causâ mortis*. *Sheedy v. Rouch*, 124 Massachusetts, 472; 26 Am. Rep. 680; *Camp's Appeal*, 36 Connecticut, 88; 4 Am. Rep. 39; *Tillinghast v. Wheaton*, 8 Rhode Island, 536; 5 Am. Rep. 621; *Gardner v. Merritt*, 32 Maryland, 78; 3 Am. Rep. 115; *Minor v. Rogers*, 40 Connecticut, 512; 16 Am. Rep. 69; *Hill v. Stevenson*, 63 Maine, 364; 18 Am. Rep. 231; *Ray v. Simmons*, 11 Rhode Island, 266; 23 Am. Rep. 447; *Pierce v. Boston, &c. Bank*, 129 Massachusetts, 425; 37 Am. Rep. 371; *Curtis v. Portland Savings Bank*, 77 Maine, 151; 52 Am. Rep. 750; *Ridden v. Thrall*, 125 New York, 572; 21 Am. St. Rep. 758; 11 Lawyers' Rep. Annotated, 684; *Jones v. Weakley*, 99 Alabama, 441.

It has been held that delivery of a pass-book will not pass money in bank as a gift *causâ mortis*, *Ashbrook v. Ryon*, 2 Bush (Kentucky), 228; 92 Am. Dec. 481; *Page v. Lewis*, 89 Virginia, 1; 18 Lawyers' Rep. Annotated, 170; and so of the donor's check on an ordinary bank, *Thomas's Adm'r v. Lewis*, 89 Virginia, 1; 37 Am. St. Rep. 818; *Jones v. Weakley*, 99 Alabama, 441; 42 Am. St. Rep. 84; 19 Lawyers' Rep. Annotated, 700.

Where the deceased never had the pass-book, but declared her wish that defendant should get it and have the money, this was held no gift. *Case v. Denison*, 9 Rhode Island, 88; 11 Am. Rep. 222. So although the donee already has the book, this does not excuse the want of manual delivery by the donor. *Drew v. Hagerty*, 81 Maine, 231; 3 Lawyers' Reports Annotated, 230; 10 Am. St. Rep. 255. A mere request to one to take the book will not suffice. *Daniel v. Smith*, 64 California, 346.

As to the delivery of keys of a receptacle containing money there is a conflict of opinion. In *Thomas's Adm'r v. Lewis*, 89 Virginia, 1; 37 Am. St. Rep. 818, it was held that "The contents of a warehouse, trunk, box, or other depository may be sufficiently delivered by delivery of the key of the receptacle." Citing *Ward v. Turner*; *Jones v. Brown*, 34 New Hampshire, 445; *Westerlo v. DeWitt*, 36 New York, 341; 93 Am. Dec. 517; *Ellis v. Secor*, 31 Michigan, 185; 18 Am. Rep. 178; *Hillebrant v. Brewer*, 6 Texas, 45; 55 Am. Dec. 757; *Elam*

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v. Keen, 4 Leigh (Virginia), 333; 26 Am. Dec. 322; *Stephenson's Adm'r v. King*, 81 Kentucky, 425; 50 Am. Rep. 172. So where the key of a closet was delivered and the donee took possession at once. *Goulding v. Horbury*, 85 Maine, 227; 35 Am. St. Rep. 357. But in *Keepers v. Fidelity, &c. Co.*, 56 New Jersey Law, 302; 23 Lawyers' Rep. Annotated, 184, the delivery of keys was held insufficient where the box was in another room, in a locked closet to which a third person had a key. The Court set out by citing *Ward v. Turner*, as "the leading case on the subject of donations *causa mortis*, where Lord Chancellor HARDWICKE laid down the rule with reference to delivery, which has ever since formed the basis whereon such gifts are supported." The Court continue: "On this footing" (*i. e.* of such delivery as "the donor could conveniently make"), "it has in some instances been held that delivery of the key was sufficient delivery for a valid donation *causâ mortis* of money or documents locked in a trunk or other receptacle, not within the presence or immediate control of the donor, and not otherwise transferred to the possession of the donee. *Cooper v. Burr*, 45 Barb. 9; *Marsh v. Fuller*, 18 New Hampshire, 360; *Jones v. Brown*, 34 New Hampshire, 439; *Thomas' Adm'r v. Lewis*, 89 Virginia, 1; 37 Am. St. Rep. 848; *Phipard v. Phipard*, 55 Hun, 433; *Pink v. Church*, 60 Hun, 580," and observe that "these cases depart from the views intended to be expressed in the leading case." Citing *Hatch v. Atkinson*, 56 Maine, 324; 96 Am. Dec. 464, and concluding: "We are not willing to approve the extreme views which have been adopted in the cases cited. We agree with the sentiment expressed in *Ridlen v. Thrall*, 125 New York, 572, 21 Am. St. Rep. 758, that 'public policy requires that the laws regulating gifts *causâ mortis* should not be extended, and that the range of such gifts should not be enlarged.' When it is remembered that these gifts come into question only after death has closed the lips of the donor; that there is no legal limit to the amount which may be disposed of by means of them; that millions of dollars' worth of property are locked up in vaults the keys of which are carried in the owners' pockets, and that under the rule applied in those cases, such wealth may be transferred from the dying owner to his attendant, provided the latter will take the key and swear that it was delivered to him by the deceased for the purpose of giving him the contents of the vault, the dangerous character of the rule becomes conspicuous. Around every disposition of the property of the dead the legislative power has thrown safeguards against fraud and perjury. Around this mode the requirement of actual delivery is the only substantial protection, and the Courts should not weaken it by permitting the substitution of convenient and easily proven devices."

A mere delivery of a receipt, without assignment, held for an instrument intended to be given, has been adjudged sufficient in the case of bonds. *Elam v. Keen*, 4 Leigh (Virginia), 333; 26 Am. Dec. 322. So of an indorsed receipt for bonds on deposit. *Crook v. First Nat. Bank*, 52 N. W. Rep. 1131. In *Stephenson's Adm'r v. King*, 81 Kentucky, 425; 50 Am. Rep. 172, it was held that the donor's delivery to the donee of the key of the donor's desk in which she kept her papers, and of a descriptive list taken by her therefrom of notes and bonds in the hands of her agent, signed by him and acknowledg-

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ing the receipt thereof, accompanied by words of gift, constituted a valid gift *causa mortis*.

In *Ellis v. Secor*, 31 Michigan, 185; 18 Am. Rep. 178, on a slate by the bedside of E., who was found dead, was written and signed by her the following: "I wish Dr. L. to take possession of all, both real, personal, and mixed. I am so sick I believe I shall die; look in valise." In a valise was found a memorandum written by her, directing Dr. L. to take all of her property. Held, a valid gift on the ground that the writing amounted to an assignment.

Where one going to war said to defendant, to whom he had lent a gun, "If I never return, you may keep the gun as a present from me," and he never returned but died in service, held, no gift. *Smith v. Dorsey*, 38 Indiana, 451; 10 Am. Rep. 118. So of a pocket-book under one's pillow, which he requested the nurse to take and give to his wife, and which she did, after his death. *Wilcox v. Matteson*, 53 Wisconsin, 23; 40 Am. Rep. 754. *Newton v. Snyder*, 44 Arkansas, 42; 51 Am. Rep. 587, is very similar. See as examples of imperfect delivery: *McCord's Adm'r v. McCord*, 77 Missouri, 166; 46 Am. Rep. 9; *Walter v. Ford*, 74 Missouri, 195; 41 Am. Rep. 312.

In respect to *donatio causa mortis* of stocks, Mr. Thornton says: "A delivery of a receipt for stock was held insufficient: *Ward v. Turner*, 2 Ves. Sen. 431, but this ruling cannot be regarded as stating the law as laid down by modern authorities." Gifts and Advancements, p. 174. And again (p. 45), citing *Duffield v. Elwes*, he says: "Some American cases have adopted this rule." *Huntington v. Gilmore*, 14 Barbour (New York Supr. Ct.) 243. "On the other hand, it is said that 'The title to a gift *causa mortis* passes by the delivery only in the lifetime of the donor, and his death perfects the title in the donee by terminating the donor's right or power of defeasance: *Emery v. Clough*, 63 New Hampshire, 552; and this is the better view: *Nicholas v. Adams*, 2 Wharton (Penn.), 17; *Marshall v. Berry*, 13 Allen (Mass.), 43, 46; *Frorlicht v. Weizenecker*, 1 Missouri Appeals, 482; *Daniel v. Smith*, 64 California, 346; *Parish v. Stone*, 14 Pickering (Mass.), 198; *Devol v. Dye*, 123 Indiana, 321. The case of *Barnes v. People*, 25 Illinois Appeals, 136, is certainly erroneous."

Grymes v. Hone, 49 New York, 17; 10 Am. Rep. 313, was a case of an assignment of bank stock to a granddaughter, with delivery of the assignment to the donor's wife with instructions to give it to the granddaughter in case of his death. The donor died five months afterward, and the Court enforced the delivery of the assignment notwithstanding there had been no transfer on the books of the bank. The Court said: "It is urged that this gift was not completed; that the stock was not transferred on the books of the bank, and could not be until the certificate held by the donor was surrendered, and that equity will not aid volunteers to perfect an imperfect gift.

"Within the modern authorities this gift was valid, notwithstanding these objections. The donor by this assignment and power parted with all his interest in the stock assigned as between him and the donee, and the donee became the equitable owner thereof as against every person but a *bona fide* purchaser without notice. Delivery of the stock certificate without a transfer on the bank's books would have made no more than an equitable title as

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against the bank (*N. Y. and N. H. R. R. Co. v. Schuyler*, 34 New York, 80, and cases cited), though it would give a legal title as against the assignor. *McNeil v. Tenth Nat. Bank*, 46 New York, 325, just decided, and according to the case of *Duffield v. Elwes*, 1 Bligh N. S. 497, 530, decided in the House of Lords. The representatives of the donor were trustees for the donee by operation of law to make the gift effectual. See also to the same effect, *Ex parte Pye*, 18 Ves. 140; *Kekewich v. Manning*, 1 DeG., M. & G. 176; *Richardson v. Richardson*, 3 Equity Cases, 686. This trust, like this species of gift, is peculiar. This trust, like the gift, is revocable during the donor's life, and is perfected and irrevocable by his death.

"This extended the law as laid down by Lord HARDWICKE, in *Ward v. Turner*, 2 Ves. Sr. 431, 442, upon this subject, and our Courts have gone in the same direction with *Duffield v. Elwes*. Where notes payable to the donor's order and not indorsed, and other things of similar character, have been given *mortis causâ*, Courts compel the representatives of the donor to allow the donee to sue in their name, though the legal title has not passed. See last case; *Grover v. Grover*, 24 Pickering (Mass.), 261; *Chase v. Redding*, 13 Gray, 418; *Bates v. Kempton*, 7 id. 382; and see, also, *Westerlo v. De Witt*, 36 New York, 340; *Walsh v. Sexton*, 55 Barb. 251.

"The equitable title to this stock is thus passed by the assignment, and it was not necessary to hand over the certificate. A Court of equity will compel the donor's representatives to produce the certificate that the legal title to the stock may be perfected."

In *Walsh v. Sexton*, 55 Barbour (New York Supr. Ct.), 251, and *Allerton v. Lang*, 10 Bosworth (New York Super. Ct.), 362, it was held that title passed by bare delivery of the certificate, without indorsement or transfer.

The last three cases are cited by Cook on Stockholders as showing the American law on the subject, and no others are cited.

Hatcher v. Buford, 60 Arkansas, 169; 27 Lawyers' Rep. Annotated, 507, is apparently a case of delivery of bank stocks without writing or transfer on the bank books, and it was held valid, citing *Ward v. Turner* on the general necessity of delivery.

No. 1. — *Murray v. Elliston*, 5 Barn. & Ald. 657. — Rule.

DRAMATIC AND MUSICAL COPYRIGHT.

No. 1. — *MURRAY v. ELLISTON*.

(1822.)

No. 2. — *TOOLE v. YOUNG*.

(1874.)

No. 3. — *WARNE v. SEEBOHM*.

(1888.)

RULE.

PREVIOUSLY to “Bulwer Lytton’s Act” (3 & 4 Will. IV. c. 15), the author of a dramatic composition was not protected (except indirectly by the restraint against circulation of unauthorized copies) from having his drama (whether previously printed and published or not) represented, with or without abridgment or adaptation, by unauthorized persons on a public stage.

And where a literary composition is not dramatic in form, there is still no law against a representation by unauthorized persons of a drama founded on it, except indirectly by the restraint upon making copies of the parts, so as to be an infringement of a literary copyright.

Murray v. Elliston.

5 Barn. & Ald. 657-661 (24 R. R. 519).

Dramatic Copyright.

[657] The manager of a theatre having publicly represented for profit a tragedy, altered and abridged for the stage, without the consent of the owner of the copyright, is not liable to an action, although the tragedy had been previously printed and published for sale.

The LORD CHANCELLOR sent the following case for the opinion of this Court. In 1820 Lord Byron wrote a book entitled

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“*Marino Faliero*, Doge of Venice,” an historical tragedy, in five acts, with notes; and by deed, dated April 14th, 1821, he assigned the said tragedy and poem, and the copyright thereof, and the exclusive right of printing and publishing the same, and all benefit and advantage thereof, to the plaintiff, in consideration of the sum of £1050, which was duly paid. The plaintiff caused the tragedy to be printed; and, on the 21st April, 1821, copies of it were, for the first time, printed and published for sale, for the sole benefit of the plaintiff. The defendant, being the manager of the Theatre Royal, Drury Lane, after the publication of the tragedy, printed and exposed to view, at the entrance to the theatre, and at divers other places, in the most conspicuous parts of London and Westminster, a bill of the performances at the theatre, dated 24th April, 1821, in which was contained the following notice: “Those who have perused ‘*Marino Faliero*’ will have anticipated the necessity of considerable curtailments; aware that conversations or soliloquies, however beautiful and interesting in the closet, will frequently tire in public recital. This intimation is due to the ardent admirers of Lord Byron’s eminent talents, and will, it is presumed, be a sufficient apology for the great freedom used in the representation of this tragedy on the stage of Drury Lane Theatre.” And at the foot of the *bill, the defendant announced and advertised the [*658] tragedy, altered and abridged for theatrical representation at the theatre, as follows: “To-morrow, for the first time, Lord Byron’s tragedy of ‘*Marino Faliero*, Doge of Venice.’” No permission or authority was at any time given by the plaintiff or Lord Byron to the defendant, or to any other person or persons, to represent or perform the tragedy printed for the plaintiff, or any part thereof, or to give out, announce, or advertise the same for theatrical representation. On the 25th April, 1821, the plaintiff filed his bill in Chancery for an injunction to restrain the defendant from acting the tragedy at Drury Lane Theatre, which was granted. On the evening of the same 25th day of April, the defendant publicly represented the tragedy, altered and abridged, for profit, at the Theatre Royal Drury Lane; but in that representation certain parts of it, which the said defendant thought not fit for representation, were omitted. The question was, whether an action could be maintained by the plaintiff against the defendant, for publicly acting and representing for profit the tragedy so abridged.

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Scarlett, for the plaintiff. This question is quite different from that in *Colman v. Wathen*, 5 T. R. 245. There, it turned upon the words of the statute, 8 Anne, c. 19, and the point determined was, that the acting a piece on the stage was not a publication of it within that statute. Here, the question is different; for it depends not on the statute, but on the right of property which the plaintiff has in this work. The moment such a right is established, the consequences must follow, that any injury done to the property is the subject of legal redress. This is [* 659] only one mode in which it may be *injured. Unfair and malicious criticism is another, and for that an action will lie. *Carr v. Hood*, 1 Camp. 355, n. (10 R. R. 701, n.). Suppose this play failed of success when represented, the sale of the work would thereby be damaged. Besides, the curiosity of the public would be thereby satisfied, and so the plaintiff would be injured in the sale of the work. And, whether that right of property arise from the common law, or from the statutes relative to it, is in this case immaterial. For, if the statute makes a literary work property, the common law will give the remedy for the invasion of it. The only question is, whether the representation of this piece for profit may not injure the copyright. If so, the plaintiff is entitled to the judgment of the Court.

Adolphus, *contra*. In *Donaldson v. Beckett*, 4 Burr. 2408, the majority of the Judges were of opinion, that the action at common law was taken away by 8 Anne, c. 19, and that the author was precluded from every remedy, except on the statute and on the terms and conditions prescribed thereby. The claim by the plaintiff on this occasion is at variance with this decision. For here, he contends for a far more comprehensive security, and one coexisting with that given by the statute, and restraining the public in points of which the statute takes no notice. The case of *Macklin v. Richardson*, Amb. 694, was very different. There the farce of "Love a-la-Mode" had never been published, and the defendant having employed a short-hand writer to take it from the mouths of the actors, published it, and it was [* 660] held that he could not do so. But when, *in *Colman v. Wathen*, 5 T. R. 245, the converse of this was attempted, the Court held, that the action would not lie. This decision was plainly founded on the nature of copyright, the property in which is exactly the same as if but one book existed, which

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the author permitted individuals to read on payment of a certain sum. The injury then which an author sustains by the violation of his copyright, is this; that a stranger, without permission, disposes of the use and possession of this, his book, and thereby receives the profits to which he, the author, is justly entitled. If then the book be not in all reasonable strictness such as may be called the author's own book, as if it be a *bonâ fide* abridgment, *Gyles v. Wilcox* and others, 2 Atk. 141, shows that the author has no remedy. Now, in the present case, a theatrical exhibition falls within the principle above laid down. Persons go thither, not to read the work, or to hear it read, but to see the combined effect of poetry, scenery, and acting. Now of these three things, two are not produced by the author of the work; and the combined effect is just as much a new production, and even more so than the printed abridgment of a work. There are many instances in which works published have thus, without permission of their authors, been brought upon the stage. The safe rule for the Court to lay down is, that an author is only protected from the piracy of his book itself, or some colourable alteration of it, and in that case the defendant is entitled to the judgment of the Court.

Cur. adv. vult.

*The following certificate was afterwards sent: [*661]

We have heard this case argued by counsel, and are of opinion, that an action cannot be maintained by the plaintiff against the defendant for publicly acting and representing the said tragedy, abridged in manner aforesaid, at the Theatre Royal Drury Lane, for profit.

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

Toole v. Young.

L. R., 9 Q. B. 523-531 (s. c. 43 L. J. Q. B. 170; 30 L. T. 599; 22 W. R. 694).

Dramatic Copyright. — *Dramatising a Novel.* — 3 & 4 Wm. IV. c. 15, [523] ss. 1 and 2.

H. wrote and published a novel which he afterwards dramatised. He assigned the drama to the plaintiff, but it was never printed, published, or represented upon the stage. G., in ignorance of H.'s drama, also dramatised the novel in a different form, and assigned his drama to the defendant, who represented it on the stage: —

Held, that H. having published his novel, any one might dramatise it, and,

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although the two dramas were founded upon the novel written by H., the representation upon the stage of the drama written by G. was not a representation of the drama written by H.; and that the plaintiff could, therefore, not recover penalties from the defendant under 3 & 4 Wm. IV. c. 15, ss. 1 and 2.

Declaration for representing a dramatic piece called "Shop," whereof the plaintiff was the proprietor, as the assignee of [* 524] one * Hollingshead, the author thereof, without the consent in writing of the plaintiff, contrary to 3 & 4 Wm. IV. c. 15, ss. 2 and 3.¹

Pleas: 1. Not guilty. 2. That plaintiff was not the proprietor as alleged. 3. That plaintiff was not the assignee of the author. 4. That the piece was not composed by Hollingshead.

Issue joined.

At the trial, before COCKBURN, C. J., at the London sittings after Hilary term, 1873, it was admitted that in April, 1863, one Hollingshead wrote a novel called "Not Above his Business," in a publication called "Good Words." The novel was of a dramatic character, and within a month or two after it had appeared in "Good Words" Hollingshead wrote the drama "Shop," which was in effect the novel dramatised. The only difference between the two was that in the drama the narrative part of the novel was turned into stage directions, and description of the characters, and of the scenes, furniture, and other matters to be represented on the stage. In January, 1865, Hollingshead assigned the manuscript of the drama "Shop" to the plaintiff. It was never printed nor published, nor was it ever represented on the stage by either Hollingshead or the plaintiff. In 1869, one Grattan, being ignorant that Hollingshead had put the novel "Not Above his Business" into the form of a drama, composed a drama called "Glory," taking the incidents and dialogue from the novel as published in "Good Words." The two dramas were, however, essentially different.

¹ By 3 & 4 Wm. IV. c. 15, s. 1, "The author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed and not printed and published by the author thereof, or his assignee, or which hereafter shall be composed and not printed or published by the author thereof, or his assignee, or the assignee of such author, shall have, as his own property, the sole liberty of representing, or causing to be represented, at any place or places of

dramatic entertainment whatsoever in any part of the United Kingdom of Great Britain and Ireland, . . . any such production as aforesaid not printed or published by the author thereof, or his assignee, and shall be deemed and taken to be the proprietor thereof. . . ."

Sect. 2 imposes a penalty upon a person representing any dramatic production without the consent in writing of the author or other proprietor.

Grattan assigned his drama to the defendant, who represented it on the stage in a theatre of which he was the proprietor.

On these facts COCKBURN, C. J., nonsuited the plaintiff, with leave to move to enter a verdict for £50.

* A rule was accordingly obtained on the ground that [* 525] there was an infringement of the plaintiff's right.

Digby Seymour, Q. C., and Lumley Smith, showed cause. The nonsuit is right; the defendant did not represent the plaintiff's drama; he adopted for the stage a novel which was open to all the world. Hollingshead and Grattan drew from a common source the materials used by them in producing their respective dramas, but in no way is Grattan indebted to Hollingshead's drama. The defendant has not represented the production of which another person is the proprietor within the meaning of 3 & 4 Wm. IV. c. 15, s. 1. As soon as a novel is published the author is entitled to prevent the multiplying and distribution of copies without his consent, but his right does not extend beyond this. The law allows the novel to be dramatised by other persons, and the mere fact that the author himself dramatised it subsequently to its publication does not take away the right of other persons to dramatised it in a different shape. *Jefferys v. Boosey*, 4 H. L. C. 815; 24 L. J., Ex. 81; *Reade v. Conquest*, 9 C. B. (N. S.) 755; 30 L. J. C. P. 209; *Reade v. Conquest*, 11 C. B. (N. S.) 479; 31 L. J. C. P. 153.

Sir J. B. Karlake, Q. C., and Lucius Kelly, in support of the rule. The argument on the other side amounts to this, that the author of a novel cannot, upon subsequently dramatising it, confer upon himself a valid title to his drama. Hollingshead is the author of a dramatic piece composed, but not published, by him, and the defendant has represented a drama which is in law a reproduction of the drama assigned to the plaintiff by Hollingshead; the defendant is therefore liable to the penalties of the Act. The second case of *Reade v. Conquest*, 11 C. B. (N. S.) 479; 31 L. J. C. P. 153, shows that, although there was no intention to infringe the rights of the plaintiff, the defendant is nevertheless liable. There was a double production by Hollingshead: first, he wrote the novel, then he wrote the drama. The only reason why he cannot be said to be the author of the drama is, that he has taken the drama from his own novel. This appears to be an absurd conclusion. If A. and B. dramatised a novel of a third person, they may be said to draw their productions from * a common source; [* 526]

but in this case Grattan composed his drama of materials furnished by Hollingshead himself. In the first case of *Reade v. Conquest*, 9 C. B. (N. S.) at p. 759, ERLE, C. J., in speaking of the right to dramatise novels without the author's consent, said: "Perhaps the only way in which the author of a novel can protect himself from this sort of infringement is by dramatising it himself;" and WOOD, V. C., in *Tinsley v. Lacy*, 32 L. J. Ch. at p. 537; 1 H. & M. 747, seems to be of the same opinion. He says: "I suppose if this lady [the author of the novel] wished to protect herself in the matter as the law now stands, all she would have to do would be to take a pair of scissors and cut out certain scenes, and publish a little drama of her own, because if she first published a work like this in the shape of a drama, she would come within the protection of the Dramatic Author's Copyright Act." These are strong *dicta* to show where the author himself dramatises his novel he is entitled to the protection of the Act against any other attempt to dramatise the novel.

COCKBURN, C. J. I am of opinion that this rule must be discharged. The question turns upon the construction of 3 & 4 WIL. 4, c. 15, an Act for the protection of literary compositions.

The facts of the case are, that Mr. Hollingshead wrote a story, which he published in a work called "Good Words;" and having in his mind at the time he wrote and published it, the intention of afterwards dramatising the story, he composed it very much of a dramatic character. After the story had been published and given to the world, Mr. Hollingshead did dramatise it. The drama resembled the story, but was fuller in its incidents. He then assigned the drama to the plaintiff; but it was never published and never represented on the stage. It was kept by the plaintiff with the view of putting it on the stage when a convenient opportunity should offer. In the meantime Mr. Grattan, having read the story and seeing in it the elements of a popular drama, dramatised it; he thus derived the materials for the composition of his drama from the same source to which Mr. Hollingshead had himself resorted, namely, the latter's novel. The question is whether the de-

fendant has caused to be represented the production of Mr. [* 527] Hollingshead. In fact, the drama written by Mr. * Hollingshead and the drama written by Mr. Grattan are quite independent of each other. The defendant acted *bonâ fide* without any knowledge that Mr. Hollingshead had dramatised his own work: the

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defendant proceeded just as the assignee of any dramatic author might have done in the assertion of what he believed to be a perfect and undeniable right, and caused the drama which Mr. Grattan composed of the materials taken from Mr. Hollingshead's story to be represented on the stage. The first case of *Reade v. Conquest*, 9 C. B. (N. S.) 755; 30 L. J. C. P. 209, establishes this proposition, that an author has a right to convert a novel written by another person into a drama without infringing the copyright existing in the novel. It follows that two persons may dramatise the same novel, for that is common property. It is true that a writer cannot produce and represent a drama which he has borrowed from a drama written previously by another person; he would then be representing the production of the first dramatist, contrary to the terms of the Act of Parliament. I wish to guard myself against being supposed to lay down that, if a writer, while dramatising a novel, takes the incidents, characters, and dialogue of a previous drama founded upon that novel, and reproduces what is in substance identical with the previous drama, there might not be an infringement of the right of the earlier dramatist, if the later drama be represented on the stage. It is not necessary, however, to decide that, because here the two dramas are not identical; there is a great deal of difference between the two, the later work being by far the larger, the more complete, and the more perfect form into which the materials of the novel have been thrown. The author of a novel is not protected against having his novel put into the form of a drama by different persons, and it seems to make no difference that he himself has dramatised it. When an author has once given his novel to the world, he cannot take away from other persons the right to dramatise it by himself transforming it into a drama, subject to this, that they must not borrow from his drama but only from his novel. The author of a drama is not protected by the common law, and what the defendant has done is not forbidden by any statute. I therefore think the nonsuit ought not to be set aside.

* BLACKBURN, J. I am of the same opinion. I take it that [* 528] when Mr. Hollingshead wrote his novel he merely published it as a book, although, no doubt, he had the intention of ultimately dramatising it; and according to the decision in the first case of *Reade v. Conquest*, 9 C. B. (N. S.) 755; 30 L. J. C. P. 209, which seems to me perfectly right, Mr. Hollingshead merely acquired the

right to restrain persons from printing and publishing and multiplying copies of his novel; and however shabby and discreditable it may seem, any person has a right to dramatise the novel without being liable to an action on the ground that Mr. Hollingshead had the copyright. The defendant having represented a drama taken from Mr. Hollingshead's novel, he is sued on the ground that before the drama performed by the defendant had been written, Mr. Hollingshead had also composed a drama founded upon the novel, which drama he sold and assigned to the plaintiff. It is now urged on the plaintiff's behalf that he had the monopoly of representing not only the drama composed by Hollingshead, but also of restraining the performance of any other drama originating from the same source.

Before going to the statute, I may observe that, in my opinion, the previous publication of the novel did not prevent Mr. Hollingshead from being the owner of the drama adapted from it; on the contrary, I think he was the proprietor of it, and could make a valid assignment of it to the plaintiff. And I also think that Mr. Grattan, was the author of the drama represented by the defendant, and if it were pirated the defendant, as the assignee of Grattan, would be entitled to restrain the piracy. I do not see any reason why both Mr. Hollingshead and Mr. Grattan are not to be considered as authors to the extent to which they have exercised their ingenuity in turning the novel into a drama.

The question really turns upon ss. 1 and 2 of 3 & 4 Wm. IV. c. 15. It is not denied that, if the first drama had been written by a person other than Mr. Hollingshead, an action could not have been maintained against the defendant for representing Mr. Grattan's drama, inasmuch as the latter is not taken from the earlier production, but only from the novel, which was the common source. Notwithstanding a *dictum* of ERLE, C. J., in the first [* 529] case * of *Reade v. Conquest*, 9 C. B. (N. S.) at p. 759, and another of WOOD, V. C., in *Tinsley v. Lacy*, 32 L. J. Ch. at p. 537; 1 H. & M. 747, who appear to have been of a different opinion, I cannot think that the mere fact of Mr. Hollingshead being himself the author of the novel, as well as of the first drama, makes any difference. I think that the defendant has represented the novelistie production of Mr. Hollingshead, but has not represented his dramatic production; and I think this follows from the

second case of *Reade v. Conquest*, 11 C. B. (N. S.) 479 ; 31 L. J. C. P. 153, when that case is properly considered. There the plaintiff had written a novel founded upon a play called, "Gold," also written by him ; he took out some portions of the play and put them into the novel called "Never too late to Mend ;" the defendant, being in ignorance of the plaintiff's play, took portions of the novel, which were also in the plaintiff's play, and inserted them in a drama of his own. The Court of Common Pleas held, that inasmuch as the defendant had in fact taken portions of "Gold," though he had taken them out of the novel "Never too late to Mend," and thereby had reproduced parts of "Gold," his ignorance of his having infringed the rights of the plaintiff in "Gold" was no reason why he should not be liable in an action at the suit of the plaintiff. But in the present case the facts are of a contrary description. Mr. Hollingshead has taken parts of the novel and put them into a drama, and it is contended that Mr. Grattan having taken parts out of the novel, this is therefore an appropriation of portions of Mr. Hollingshead's drama. This argument seems to me to be incorrect in point of fact, and I think that the defendant cannot be held liable. I think, as at present advised, that if Mr. Hollingshead's drama had been plagiarised the defendant would have been liable to an action ; and in the present case if Mr. Hollingshead's drama had been produced upon the stage a jury would have found that Mr. Grattan, having the means of knowing of Mr. Hollingshead's drama, had, as a matter of fact, plagiarised from it ; but Mr. Hollingshead's drama never having been represented, Mr. Grattan did not plagiarise, and therefore the defendant is entitled to keep the non-suit, and the rule must be discharged.

* QUAIN, J. In order to enable the plaintiff to succeed, [* 530] he must prove that the defendant has represented the dramatic production of the plaintiff or the plaintiff's assignor. I think that this has not been established. In the first place, the dramatic production of Mr. Hollingshead was neither published nor represented. Mr. Grattan had no knowledge of its existence. Therefore it cannot be said that the defendant caused to be represented the dramatic production of Mr. Hollingshead. The second case of *Reade v. Conquest*, 11 C. B. (N. S.) 479 ; 31 L. J. C. P. 153, certainly goes a long way ; but it is quite distinguishable from the present case, inasmuch as here the novel was written first ; and, as is clear from the first

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case of *Reade v. Conquest*, 9 C. B. (N. S.) 755; 30 L. J. C. P. 209, anybody might have dramatised the novel if Mr. Hollingshead had not dramatised it, and I cannot understand that his putting the novel afterwards into the form of a drama can deprive other persons of the right to dramatise the novel which they enjoyed before he did so; especially when the fact that Mr. Hollingshead himself had dramatised it was unknown to the public. I therefore think the rule must be discharged.

ARCHIBALD, J. I am also of the same opinion. The rights of the parties depend upon the true construction of 3 & 4 Wm. IV. c. 15. There is no complaint made of an infringement of the plaintiff's book copyright in his novel; the complaint is an infringement of his stage right, so to speak, in the drama, and the question is, has there been a representation of any production of the plaintiff which falls within s. 1 of the Act? Now without going again into the reasons given by the other members of the Court, there is a clear and intelligible distinction between this case and the second case of *Reade v. Conquest*. The grounds of that decision appear to be that there the drama was first composed, and afterwards the novel; and if there had been a direct copying by the defendant from the drama, that clearly would have been a violation of the Act; the novel, having been composed after the drama, was regarded by the Court of Common Pleas as in some sense a copy of the drama, so that in copying from the novel, and using the novel for the purpose of dramatising it, [* 531] the *defendant was treated as copying indirectly from the published drama; a drama produced under these circumstances might be a reproduction of a drama composed by the plaintiff. But the present case is different. The novel is first composed, and then the drama is composed from the novel, and the defendant, in copying from the novel, or in using the novel for the purpose of his drama, cannot be said in any way to have made an indirect use of the plaintiff's drama, the more especially as it is admitted that he was wholly unaware of the plaintiff's or Mr. Hollingshead's drama. And as the novel upon its publication became open to Grattan, as to all the world, for the purpose of dramatising, the case does not fall within s. 2; the representation of Grattan's drama not being a representation of the plaintiff's drama.

Rule discharged.

Warne v. Seebohm.

39 Ch. D. 73–83 (s. c. 57 L. J. Ch. 689; 58 L. T. 928; 36 W. R. 686).

Copyright. — Infringement by Copies for Dramatic Representation.

The defendant dramatized the novel, “Little Lord Fauntleroy,” and [73] caused his play to be performed on the stage. The infringement of copyright complained of was that, for the purpose of producing the play, the defendant made four copies of it, one for the Lord Chamberlain and three for the use of the performers, either in MS. or by the aid of a typewriter. Very considerable passages in the play were extracted almost *verbatim* from the novel. The defendant claimed the right to make more copies if it should be necessary to enable him to give further representations of the play in London and elsewhere : —

Held, that what had been done by the defendant constituted an infringement of the plaintiffs’ copyright, and that they were entitled to an injunction to restrain the defendant from printing or otherwise multiplying copies of his play containing any passages from the plaintiff’s book :

Held, also, that all passages from the plaintiff’s book in the four copies must be cancelled.

An action by the proprietors of the copyright in a novel, “Little Lord Fauntleroy,” written by Mrs. Frances Hodgson Burnett, asking for an injunction to restrain the defendant, a dramatic author, from printing or otherwise multiplying copies of the novel, and from doing any other act or thing in invasion or infringement of the plaintiffs’ copyright in the novel. The defendant had dramatized the novel, and the drama entitled “Little Lord Fauntleroy,” had on several occasions been represented upon the stage at the Prince of Wales’s theatre. An injunction was moved for on the 23rd of March, when after some discussion it was ordered that — the defendant giving an * undertaking not to make any more copies of his play, if [* 74] the trial of the action should be advanced — the trial of the action should take place on the 24th of April, and it accordingly came on to be heard upon that day. “Little Lord Fauntleroy” was first published in parts in an American magazine. The book was subsequently published by the plaintiffs in this country, where they registered the copyright.

On the 4th of February, 1888, the defendant wrote to Mrs. Burnett, who was at that time staying at Florence, the following letter : —

“DEAR MADAM, — I write to tell you I have taken the liberty of writing a little comedy in three acts, the motive of which has

been suggested to me by your most charming story, 'Little Lord Fauntleroy.' I have, however, retained most of the characters, and have let them remain just as you have so beautifully sketched them, with the exception of the boy Cedric, whom I have had to make a little older. I have naturally had to invent a large amount of fresh plot and action in order to develop the dramatic intensity of the theme, but I assure you that in doing so I have striven my utmost to handle the material at my command as delicately as possible, and sincerely trust I have written nothing that could cast a slur on one of the most beautiful stories it has ever been my pleasure to read. The comedy, which I intend playing at an experimental performance at an early date, has been most highly spoken of by those critics who have read it, and I trust, my dear Madam, that in its production I shall receive your complete sanction."

Mrs. Burnett replied, by telegram: "The dramatic right to 'Fauntleroy' is legally reserved. It must not be infringed. Have dramatized myself." And afterwards by the following letter:—

"DEAR SIR,—Your letter, to which I have just telegraphed reply, was a great surprise to me. On the titlepage of each copy of 'Lord Fauntleroy' is printed 'All rights reserved.' This, I have been informed by authority, legally secures to me the dramatic right, and enables me to protect myself if it is infringed. [*75] My object in taking this precaution was to dramatize * the story myself. This I have already begun to do. You will see that it would be out of the question to expect my consent to the production of a play founded upon my work without the slightest reference to my rights or consultation with me. . . . It is my wish to do the work myself, and it certainly would seem my right to do it, even in these days, when the work of one's brain, the power that cannot be bought and the professional skill that cannot be taught, are the things which seem least one's own."

In reply to the telegram the defendant wrote as follows:—

"DEAR MADAM,—Your telegram to hand. You appear to be labouring under some delusion as regards the reservation of the dramatic rights of your story. By the English law any one may adapt for stage representation any novel, story, or tale published either by itself or in a magazine or journal. The author of the

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story can prevent the play from being printed and sold as a book, but he or she cannot prevent it being acted. The only way in which the author of a story can reserve for himself the stage rights is by dramatizing it and publicly representing it before its publication as a book. As there is no record of your story having been produced as a play previous to its publication as a book, I am afraid, my dear Madam, you cannot reserve for yourself the sole right of dramatizing it. Moreover, the comedy I have written is not a dramatic version of your story; it is only suggested by it; the best part of the plot and dialogue, and nearly all the situations, are quite original. I am exceedingly sorry, my dear Madam, that I should have to do anything that is opposed to your wishes, but when you come to consider the matter not only from a legal, but from a practical point of view, I trust that you will see the matter in a different light."

Further correspondence followed, and in one letter the defendant offered Mrs. Burnett a share of the profits, but still she refused her sanction to the dramatization by the defendant of her book. Notwithstanding what had passed, the defendant proceeded to arrange for the performance of the play, and the defendant wrote to Mrs. Burnett announcing that it had been produced at the Prince of Wales's theatre with immense success. The evidence showed that the names of the principal characters * in the play were the same as those in the novel; [* 76] that the principal situations in the novel were reproduced in the play; that the plot of the play was in all its salient points identical with that in the novel, and that all the principal ideas were taken from the novel; that a considerable portion of the dialogue, especially the artless sayings of the "Little Lord," which formed the chief attractions of the novel, were taken, in many instances, word for word from the book, and in other parts of the play explanatory and descriptive passages in the novel were introduced in the form of dialogue. Four copies of the play had been made, and one of them had been sent to the office of the Lord Chamberlain. It was stated that Mrs. Burnett had a large interest in the copyright.

Hastings, Q. C., and E. F. Studd, for the plaintiffs: —

The only issue to be tried is whether the copies which have been made are an infringement. The right to represent the play upon the stage it is not sought to interfere with in any way, but

it is submitted that the making of the copies is an infringement of the copyright in the novel. That passages in the book have been taken and adapted in the play is clear from an examination. Taking the first act for comparison, the play is in fact substantially a copy or reproduction of the novel. The case clearly comes within the decision of *Ager v. Peninsular and Oriental Steam Navigation Company*, 26 Ch. D. 637; 53 L. J. Ch. 589. The cases of *Coleman v. Wathen*, 5 T. R. 245; and *Murray v. Elliston*, (p. 868, *ante*) 5 B. & Ald. 657 (24 R. R. 519), show that representation upon the stage, accompanied by appropriate action and recitation, is not a publication or multiplying of copies within the statute. The other side will no doubt rely upon the case of *Reade v. Conquest*, 9 C. B. (N. S.) 755; 11 C. B. (N. S.) 479; 30 L. J. C. B. 209, which followed those cases, but the action in that case seems to have been brought under sect. 15 of the copyright act of 1842. It is not, however, the form which the copy assumes which infringes the copyright, but the substance of it. If in the form of a play, that is an infringement and a piracy of the book, and it is not the less so because it has assumed the form of a play. *Tinsley v. Lacy*, 1 H.

& M. 747; 32 L. J. Ch. 535. It is not sought to interfere [* 77] with the * representation of the play, but the four copies which have been made, and which constitute an infringement of the plaintiffs' rights — no matter what the defendant intends to do with them — ought to be ordered to be given up to the plaintiffs. Comparing the novel with the play, there has been an infringement, and the plaintiffs are entitled to an injunction to restrain the invasion of their statutory rights. Damages are not asked for. [*Toole v. Young* (p. 871, *ante*), L. R., 9 Q. B. 523, 43 L. J. Q. B. 170; *Novello v. Sudlow*, 12 C. B. 177, 21 L. J. C. P. 169, and *Hogg v. Scott*, L. R., 18 Eq. 444, 43 L. J. Ch. 705, were also referred to].

Buckley, Q. C., and Lewis Coward, for the defendant: —

It is beyond dispute that the defendant is entitled, as a matter of law, to dramatize the novel. The action, obviously, was not brought merely to prevent half-a-dozen copies being made, but it was an attempt to prevent the introduction of the play on the stage, and the performers from learning their parts. The object was, not to compel the purchase of so many copies of the novel, but to take from the drama the parts to be learnt. The question is whether the plaintiffs are entitled to any such right.

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Infringement is a matter of degree. The whole play should be read, and the Court must consider how much was taken from this novel; for what purpose; and with what view the copies were prepared. The question for decision is, it being granted that it is lawful for the defendant to dramatize the novel, whether the defendant can or cannot write his play. It is argued that he cannot make a single copy. But he must write his play in dramatizing, — he could not commit it to memory, or send for the stage manager and recite it to him for his opinion. If considered to be good for production on the stage, would the performers have to learn their parts from the author's dictation? The drama must be written. There must be a copy at least, for the law requires that one shall be sent to the Lord Chamberlain. A person may write that which he conceives, and that is not a multiplying of copies. That is the result of the decisions in *Reade v. Conquest*, 9 C. B. (N. S.) 755; 11 C. B. (N. S.) 479; 30 L. J. C. P. 209, and *Tinsley v. Lacy*, 1 H. & M. 747; 32 L. J. Ch. 535.

* It is a fallacy to say that multiplying alone is an in- [*78] fringement of the statute. There must be an investigation for the purpose of seeing whether the production of copies interferes with the sale of the book: *Scott v. Stanford*, L. R., 3 Eq. 718; 36 L. J. Ch. 729. The plaintiff's complaint in this case was trifling. The defendant might have bought a few copies of the novel and arranged his play in the use of them by the application of scissors and paste. It may be that the defendant's play has interfered with the sale of six copies of the book, — so small a matter that the Court would not take notice of it. In *Novello v. Sudlow*, 12 C. B. 177; 21 L. J. C. P. 169, there was clearly an infringement, as each of the four parts of the song was taken, and a great many copies of the music were made. The plaintiff in that case was deprived of the benefit which he expected. The question determined there was that there had been a multiplying, but not for sale or exportation, and that sects. 2 and 3 of the Copyright Act, 1842, were not cut down by sect. 15. *Ager v. Peninsular and Oriental Steam Navigation Company*, 26 Ch. D. 637; 53 L. J. Ch. 589, was also a clear case of an infringement of the plaintiff's copyright.

Hastings, in reply, referred to the case of *Chatterton v. Cave*, 3 App. Cas. 483; 49 L. J. C. P. 545.

1888. May 10. STIRLING, J.: —

This is an action brought by the proprietors of the copyright in

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a novel, or tale, written by Mrs. Frances Hodgson Burnett, and entitled "Little Lord Fauntleroy," to restrain an alleged infringement of their rights, by the defendant, who is the author of a play also entitled "Little Lord Fauntleroy." The defendant has, in fact, dramatized the novel and caused his play to be performed on the stage. Of this the plaintiffs do not complain: the alleged infringement consists in this, — that for the purpose of producing the play the defendant has made four copies of the play either in manuscript or by the aid of a typewriter. One of these copies has been deposited with the Lord Chamberlain; the other three have remained in the possession of the defendant or the persons employed by him in the representation of the piece. Copies of the novel and of the play have been put in evidence. It [* 79] was *admitted at the bar, and I have satisfied myself by actual comparison, that very considerable passages in the play have been extracted almost *verbatim* from the novel. Thus, in the first act there are 674 lines, of which forty-seven consist of stage directions. Deducting them, there are 627, of which 125 (or about one-fourth) are taken from the novel. Some of the passages so extracted are prominent and striking parts of the dialogue contained in the novel. It is not stated in the pleadings, but was admitted at the bar, that the defendant claims the right to make such further copies of the play as may be necessary to enable him to give further representations of his piece in London and elsewhere. I have now to decide whether the plaintiffs are entitled to complain of what the defendant has done and intends to do; and, if so, to what relief they are entitled. It was not disputed that the plaintiffs' title depends on statute. There have been three principal Acts of Parliament on the subject of copyright. By the earliest (8 Anne, c. 19, s. 1) there was conferred on authors the sole right and liberty of printing and reprinting. In the second (54 Geo. III. c. 156, s. 4) copyright is styled "the sole liberty of printing." The Act now in force (5 & 6 Vict. c. 45) defines (sect. 2) copyright to be "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied." And by sect. 3 it is enacted that "the copyright in every book which shall after the passing of this Act be published in the lifetime of its author shall . . . be the property of such author and his assigns." By sect. 2 the word "book" is to be construed to mean and include "every volume, part, or division of a volume."

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Notwithstanding the language of the Act, not every *verbatim* reprint of part of a book is an infringement of copyright. In the words of Lord HATHERLEY in *Chatterton v. Cave*, 3 App. Cas. 492: "Books are published with an expectation, if not a desire, that they will be criticised in reviews, and if deemed valuable that parts of them will be used as affording illustrations by way of quotation, or the like,—and if the quantity taken be neither substantial nor material, if, as it has been expressed by some Judges, 'a fair use' only be made of the publication, no wrong is done and no action can be brought." In **Tinsley v. Lacy*, 1 H. & M. [*80] 747, 751, the question arose whether it was a fair use of a novel to print and publish a drama founded on it. In that case it was proved that a portion of the drama, including the most striking incidents and much of the actual language, had been taken bodily from the novel. And it was in evidence that the profit on the publication of the play had been almost inappreciable. Nevertheless, a perpetual injunction was granted against the printing and publishing of the play without any preliminary inquiry as to damages. In giving judgment Lord HATHERLEY (at that time Vice-Chancellor) said: "Although it is open to any actor or declaimer to recite a poem or other work written by another as publicly as he pleases, it could scarcely be said that he would be at liberty, on the occasion of his recitation or performance, to distribute copies of the work for sale among the audience; nor could it be any excuse to say that the copies were intended merely to assist the audience, who desired, while listening to the recitation, to have a copy of the words in their hands." In *Novello v. Sullow*, 12 C. B. 177; 21 L. J. C. P. 169, it was decided that the printing or multiplying copies of a piece of music, not for sale but for gratuitous distribution among the members of a musical society, was a violation of the right of property vested in the owner of the copyright in the piece. It must therefore follow that the gratuitous distribution among the audience of copies of a poem or other work which an actor or declaimer thought fit to recite in public would be an infringement of the copyright therein. This being so, I am unable to see that the multiplication of an indefinite number of copies of a play (which, if printed and published, would be an infringement of copyright) for the purpose of enabling that play to be publicly represented can be otherwise than an infringement. It was said, however, that any one has a right to dramatize a novel,—that is, not merely to

conceive but to write dramas and to do everything necessary for that purpose, including the making of a copy for the Lord Chamberlain. In my opinion that is a fallacious mode of stating the right. The statute confers on the author of a book and his assigns "the sole and exclusive liberty of printing or otherwise multiplying copies" of the book. By implication every person other [* 81] than the author and his assigns is prohibited from printing or otherwise multiplying copies of the book. But this is the only restriction imposed on the public, and, subject to it, every person is free to make such use of the book as he pleases. So long, therefore, as he does not print or otherwise multiply copies of the novel, any person may dramatize it, and may cause his drama to be publicly represented. But if, for the purpose of dramatization, he prints or otherwise multiplies copies of the book, he violates the rights of the author no less than if the copies were made for gratuitous distribution. The authorities appear to me to be consistent with this view. In the early cases of *Coleman v. Wathen*, 5 T. R. 245, and *Murray v. Elliston* (p. 868, *ante*), 5 B. & Ald. 657 (24 R. R. 519), (which established that the representation in public of a drama previously printed and published was not an infringement of the author's copyright), the point raised in the present action could hardly have arisen, for they were decided at a time when the statutes in force conferred only the exclusive right of printing. It is unlikely that any copies (other than manuscripts) were used for the purpose of the representation of the plays which were the subject of those actions; and such manuscript copies would not have been infringements of the author's rights. The case most relied upon for the defendant was *Reade v. Conquest*, 9 C. B. (N. S.) 755; 11 C. B. (N. S.) 479; 30 L. J. C. P. 209. It was decided on a demurrer to a count of the declaration which alleged that the defendant without the consent of the plaintiffs dramatized the plaintiffs' book, and publicly represented and performed or caused to be represented and performed as a drama the said book. The declaration did not allege that the defendant printed or otherwise multiplied copies of the book. In the course of the argument the defendant's counsel said (9 C. B. (N. S.) 764, 765): "It is not suggested here that the defendant multiplied copies of the plaintiffs' book. The complaint is, that the defendant has dramatized the story and caused it to be represented at his theatre." In giving judgment, Mr. Justice WILLIAMS said: "The right claimed

by the plaintiff was two-fold. First, he contended that his statutory right was infringed by the act of the defendant. It was held, however, in the case of *Coleman v. Wathen* that representing a *public dramatic piece of the plaintiffs' upon the [*82] stage was not a publication within the meaning of the 8 Anne, c. 19, so as to subject the defendant to the penalty imposed by the statute. And the 2nd section of the 5 & 6 Vict., c. 45, defining 'copyright' to mean 'the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied,' seems to furnish a complete answer to the plaintiff's claim under the statute." That case, therefore, seems to me to have been decided on the ground that the plaintiff's statutory right of multiplying copies of his book was not infringed. In the present case I am of opinion that if the defendant had caused his play to be printed and published there would have been as substantial an infringement of the plaintiff's right as occurred in the case of *Tinsley v. Lacy*, 1 H. & M. 747, and, for the reasons already given, I think that what has been done and is intended to be done by the defendant constitutes an infringement of the plaintiffs' legal rights no less than if the defendant had printed and published his play; and, notwithstanding the smallness of the damage, I consider myself bound by the authority of *Tinsley v. Lacy* to grant a perpetual injunction to restrain the defendant from printing or otherwise multiplying copies of his play containing any passages copied, taken, or colourably altered from the plaintiffs' novel or tale entitled "Little Lord Fauntleroy," so as to infringe the plaintiffs' copyright therein. I have introduced the last words purposely, because, as was pointed out in the course of the arguments, there is a possible mode by which, without infringing the plaintiffs' copyright, the defendant may be able to make copies of the play. The plaintiffs further insisted on an order directing the delivery up for cancellation of the existing copies of the play, and they relied on the decision in *Hole v. Bradbury*, 12 Ch. D. 886, 48 L. J. Ch. 673, that the Court has power under its general jurisdiction to order delivery up for destruction of all articles created in violation of the plaintiffs' rights. In that case, however, as I understand the facts, the whole of the work complained of was an infringement of the plaintiffs' rights. In the present case, however, upon an examination of the play, I have come to the conclusion that it *may not be impossible for the defend- [*83]

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ant to sever the passages which he has extracted from the novel from the rest of his work, and if he desires it I will give him an opportunity of doing so. He must, however, first state upon oath what copies of the work exist; secondly, extract from those copies which are in his possession or power, and deliver up to the plaintiffs for cancellation, all passages copied, taken, or colourably imitated from the plaintiffs' book; thirdly, produce to the plaintiffs, if required by them for examination, the copies after the pirated passages have been extracted, and there must be liberty for the plaintiffs to apply for a further order if they are dissatisfied with the result. The costs of the action must be paid by the defendant.

ENGLISH NOTES.

The decision in *Toole v. Young* was followed by KEKEWICH, J., in *Schlesinger v. Bedford* (11 Dec., 1890), 63 L. T. 762, where the executors of Wilkie Collins sought to restrain the representation of a drama called "The Woman in White." It appeared that the novel called "The Woman in White" had been first published by him, and that a drama under the same title had been subsequently brought out by him. It appeared that the defendant did not know of Wilkie Collins' drama, but the defendant's drama was admittedly founded on, and would have been an infringement of the copyright in, the novel, if the representation of such a drama could be legally deemed an infringement of such copyright. Mr. Justice KEKEWICH, following the authority of *Toole v. Young*, gave judgment for the defendant.

The privilege of dramatic copyright given by the Act 3 & 4 Will. IV. c. 15 is (by s. 1) "the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom in Great Britain and Ireland, in the Isles of Man, Jersey and Guernsey, or in any part of the British Dominions, any such production, &c." By art. 2 of the Berne Convention — "Authors of any of the countries of the union, or their lawful representatives, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may hereafter grant to natives."

In the "*Morocco bound*" *Syndicate v. Harris* (22 Feb., 1895), 1895, 1 Ch. 534, 64 L. J. Ch. 400, 72 L. T. 415, 43 W. R. 393, Mr. Justice KEKEWICH held that under these provisions, the Court here has no jurisdiction to restrain the representation in Germany by a British subject of a play alleged to be an infringement of the rights of the author, being also a British subject. The plaintiff's rights under the Act are expressly limited to a representation within the British Do-

Nos. 1-3. — *Murray v. Elliston*; *Toole v. Young*; *Warne v. Seebohm*. — Notes.

minions; and, although it appeared that German law would under the Convention protect the rights of the author in Germany, that did not give the Court here jurisdiction to interfere.

AMERICAN NOTES.

The first two principal cases are cited and reviewed in Drone on Copyright (1879), who says (pp. 456, 457), that the question "whether it is piratical to dramatize, for public representation, without authority, a copyrighted work in which the author has not expressly reserved to himself the right of dramatization, . . . has been judicially considered in England, but not in the United States." Mr. Drone criticises *Toole v. Young* and *Reule v. Conquest* as being in direct conflict with each other, and disapproves their general holding, instancing the dramatization of "Uncle Tom's Cabin," as an example of the hardship of such a doctrine.

By Statute (1856), playwright exists in dramatic compositions for which a copyright has been secured.

Mr. Morgan (2 Law of Literature, p. 346), cites *Murray v. Elliston*, and says, "We doubt if this case would be followed to-day." But he assumes that the dramatization was protected on the ground that it was an abridgment. He observes: "But it would be manifestly unfair to allow an author's romance or fiction to be deliberately appropriated by another author merely because the second happens to be a writer of plays."

The right of translation of a copyrighted book stands upon a similar footing as the right to dramatize and act it, and unless this right is reserved on publication of the book, a translation is no infringement. In *Stowce v. Thomas*, 2 Wallace Junior (U. S. Circ. Ct.), 547, Mr. Justice GRIER said: "By the publication of her book, the creations of the genius and imagination of the author have become as much public property as those of Homer and Cervantes. Uncle Tom and Topsy are as much *publici juris* as Don Quixote and Sancho Panza. All her conceptions and inventions may be used and abused by imitators, playwrights, and poetasters. They are no longer her own; those who have purchased her book may clothe them in English doggerel, or in German or Chinese prose. All that now remains is the copyright of her book; the exclusive right to print, reprint, and vend it, and those only can be called infringers of her rights or pirates of her property, who are guilty of printing, publishing, importing, or vending, without her license, 'copies of her book.'" Mr. Drone pronounces this decision "contrary to justice, recognized principles, and the copyright statutes of the United States as judicially construed;" "clearly wrong, unjust, and absurd" (pp. 454, 455).

The author may reserve the rights of dramatization and translation. Drone on Copyright, p. 445.

In *Carte v. Ford*, 15 Federal Reporter, 439, the "Iolanthe" case, it was held that where a vocal score of an opera is published, with a piano-forte accompaniment embodying the substantial elements of the orchestration, without any reservation of the orchestration, any one may reproduce and perform the work with new orchestration.

No. 4. — Chappell v. Boosey, 21 Ch. D. 232, 233. — Rule.

No. 4. — CHAPPELL v. BOOSEY.

(1882.)

RULE.

THE author of a dramatic or musical composition does not lose the sole right (under the Acts 3 & 4 Will. IV. c. 15, and 5 & 6 Vict. c. 45 s. 20) of representing or performing it in public by selling copies of it prior to such representation or performance.

Chappell v. Boosey.

21 Ch. D. 232-242 (s. c. 51 L. J. Ch. 625 ; 46 L. T. 854 ; 30 W. R. 733).

Dramatic and musical Representation. — Publication as a Book.

[232] The publication in this country of a dramatic piece, or musical composition, as a book, before it has been publicly represented or performed does not deprive the author of such dramatic piece, or musical composition, or his assignee, of the exclusive right of representing or performing it.

On the 14th of December, 1881, the defendant, as the director of the London Ballad Concerts, represented or performed, or caused or permitted to be represented or performed, at one of the London Ballad Concerts at St. James's Hall, Piccadilly, being a place of dramatic entertainment, a musical composition, or dramatic piece entitled, "The Bellringer," without first obtaining the consent in writing of the plaintiffs, who as assignees of one John Oxenford, were the registered proprietors of a subsisting copyright in "The Bellringer," and as the plaintiffs by their claim alleged, contrary to the statutes 3 & 4 Will. IV. c. 15, and 5 & 6 Vict. c. 45.

The plaintiffs' claim was for damages and an injunction to restrain the defendant from representing or performing "The Bellringer," or causing the same to be represented or performed, at any place of public or dramatic entertainment.

The defendant by his statement of defence denied that the song with musical accompaniment called "The Bellringer," was [* 233] a * dramatic piece, or that it was such a musical composition as is mentioned or referred to in the 20th section of the Act 5 & 6 Vict. c. 45, or that the plaintiffs had the sole liberty of per-

No. 4. — *Chappell v. Boosey*, 21 Ch. D. 233, 234.

forming the same. By the second paragraph of the defence he alleged that the song, with the music accompaniment thereto, was published as a book within the meaning of that term in the Act, long before any public performance or representation thereof.

The plaintiffs demurred to the second paragraph of the statement of defence, alleging that the same was bad in law, on the ground that the publication of the song, with the music accompaniment, as a book before any public performance or representation thereof, did not affect the plaintiffs' sole liberty of representing or performing the same, and was no defence to the plaintiffs' claim in respect of the infringement of their rights by the defendant.

By s. 1 of the Act 3 & 4 Will. IV. c. 15, it is enacted that "from and after the passing of this Act, the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed and not printed and published by the author thereof or his assignee, or which hereafter shall be composed and not printed or published by the author thereof, or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey, and Guernsey, or in any part of the British dominions, any such production as aforesaid, not printed and published by the author thereof, or his assignee, and shall be deemed and taken to be the proprietor thereof: and that the author of any such production, printed and published within ten years before the passing of this Act by the author thereof, or his assignee, or which shall hereafter be so printed and published, or the assignee of such author, shall from the time of passing of this Act, or from the time of such publication respectively, until the end of twenty-eight years from the day of such first publication of the same, and also, if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property * the sole liberty of representing, or causing to be [* 234] represented, the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof: Provided, nevertheless, that nothing in this Act contained shall prejudice, alter, or affect the right or authority of any person to represent or cause to be represented, at any place

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or places of dramatic entertainment whatsoever, any such production as aforesaid, in all cases in which the author thereof, or his assignee shall, previously to the passing of this Act, have given his consent to or authorized such representation; but that such sole liberty of the author, or his assignee, shall be subject to such right or authority."

By sect. 2 of the Act of 5 & 6 Viet. c. 45, it is amongst other things enacted "that in the construction of this Act the word 'book' shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter press, sheet of music, map, chart, or plan separately published: that the words 'dramatic piece' shall be construed to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment; that the word 'copyright' shall be construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied."

The 20th section of the last-mentioned Act is as follows:—

"And whereas an Act was passed in the third year of the reign of his late Majesty to amend the law relating to dramatic literary property, and it is expedient to extend the term of the sole liberty of representing dramatic pieces given by that Act to the full time by this Act provided for the continuance of copyright: Be it therefore enacted that the provisions of the said Act of his late Majesty and of this Act shall apply to musical compositions, and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof, and his assigns, for the term in this Act provided for the duration of copyright in books; and the provisions hereinbefore

enacted in respect of the property of such copyright and of [* 235] registering the same, shall apply to the liberty * of repre-

senting or performing any dramatic piece or musical composition, as if the same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent in the construction of this Act to the first publication of any book: Provided always, that in case of any dramatic piece or musical composition in manuscript, it shall be sufficient for the person having the sole liberty of representing or

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performing or causing to be represented or performed the same, to register only the title thereof, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor thereof, and the time and place of its first representation or performance."

By the 22nd section of the same Act, it is enacted "that no assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry book shall be made of such assignment, wherein shall be expressed the intention of the parties, that such right should pass by such assignment."

Romer, Q. C., and Cripps, in support of the demurrer : —

Macnaghten, Q. C., and Ingle Joyce, for the defendant : —

The very object of publishing a song as a book is that the public may buy it and sing it, and the author cannot afterwards be heard to say that the person buying the song from him must not put it to the use for which it was bought. The exclusive right of representing or performing a dramatic piece or musical composition cannot be gained if such dramatic piece or musical composition has been printed and published as a book before the first representation or performance. That is the view of the law taken by Mr. Justice STEPHEN, and so enunciated by him in his Digest to the Law of Copyright annexed to the Report of the Copyright Commissioners made in 1878. If that view of the law is correct, which we submit it is, then this demurrer must be overruled.

The following authorities were cited: *Boucicault v.*

* *Delafield*, 1 H. & M. 597; *Boucicault v. Chatterton*, 5 Ch. [* 236] D. 267; *Russell v. Smith*, 15 Sim. 181; *Jeffreys v. Boosey*, 4 H. L. C. 815.

NORTH, J. : —

In this case the plaintiffs claim to be the proprietors of the copyright in a musical composition called "The Bellringer," and also of the sole liberty of performing the same piece, and they sue the defendant for infringing that right by performing this composition without their consent at one of the London Ballad Concerts at St. James's Hall.

The defendant sets up, among others, the defence that the song in question with the music accompaniment therein, was published

as a book within the meaning of that term in the Act of 5 & 6 Vict. c. 45, long before any public performance or representation thereof. It is admitted that the word "published" is equivalent to published and sold.

To this defence the plaintiff demurs; and the neat question thus arises for decision, whether the publication of a dramatic piece or musical composition as a book before it has been publicly represented or performed, deprives the author or his assignee of the exclusive right he otherwise would have of representing or performing it.

The defendant relies upon two points: — First, he says that the very object of publishing a song as a book is that the public may buy it and sing it; and that the author cannot be heard to say that the person buying the song from him cannot put it to the use for which it is bought. His second point is this, that the present law upon the subject is authoritatively put forward in, and is to be found in, a Digest of the Law of Copyright annexed to the report of the Copyright Commissioners made in 1878, and adopted by them, as appears from the 6th and 14th paragraphs of that report. Article 14 of the Digest runs as follows: "The exclusive right of representing or performing a dramatic piece or musical composition cannot be gained if such dramatic piece or musical composition has been printed and published as a book before the first representation thereof."

[* 237] *This certainly is very much in point for the defendant; and I should add, while referring to that Digest, that the 16th article runs as follows: "A dramatic piece or musical composition published as a book may (it seems probable) be publicly represented without the consent of the author or his assigns."

The report, however, is not quite so strong, for the 73rd paragraph says, referring to dramatic pieces and musical compositions: "It is a question what becomes of the performing copyright on the publication of the work as a book; and there is a further question whether the performing copyright can be gained at all if the piece is printed and published as a book before being publicly performed." I must say at once that I cannot regard this Digest and report as in any way binding me as to the decision to which I ought to come, though I have carefully considered them as an assistance to me in forming my own conclusions on the subject. I may add that the articles I have just read seem not to have been quite in

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accordance with the views of the trade ; for the present defendant was examined before the commission, and I find in his published evidence —

Q. 1983 * p. 101. When you have published a song may people sing it in public without the author's leave ? — *A.* No, not without the author's leave.

And again, *Q.* 1986 *. Would a composer have a right to prevent a person from singing his song in public, he having published it ? — *A.* Certainly ; he could demand £2 a night.

Now, in my opinion, the law stands thus.

Under the Statute of Anne the author of a dramatic piece or musical composition acquired a copyright in his work so as to be enabled to prevent any other persons from multiplying copies of it ; but this did not prevent any one who thought fit to do so from representing or performing it.

The privilege of an author of a dramatic piece was extended by the Act of 3 & 4 Will. IV. c. 15, commonly called Sir Bulwer Lytton's Act, which provided that the author, or assign of the author, of any dramatic piece which was not printed or published, whether then already composed or thereafter to be composed, should have as his own property, and be proprietor of, the sole * liberty of [* 238] representing the same at any place of dramatic entertainment for a period not clearly defined and not at present material ; and that the author or assign of the author of any such piece, which was printed and published after or within ten years before the passing of that Act, should have the like sole liberty of representing the same for the term of twenty-eight years from the passing of the Act, or from the publication of the piece if it was first printed and published after the passing of the Act, or until the end of seven years after the author's death, whichever term should prove the longer.

After the passing of this Act, therefore, the author had two different rights: one, that of copyright proper, preventing the multiplication of copies of the piece itself ; the other being what may be called the acting right or performing right, conferring upon him the power of preventing other persons from publicly representing or performing the piece without his consent. This Act, however, did not extend or apply to musical compositions except so far as they came within the category of dramatic pieces or entertainments.

By the Act of 5 & 6 Vict. c. 45, commonly known as Talfourd's

Act, the rights of authors of musical compositions were extended. By the interpretation clause the word "book" was made to include every sheet of letterpress and sheet of music, and the words "dramatic piece" were made to include every scenic, musical, or dramatic entertainment.

The 20th section of that Act is as follows. [His Lordship read the section as set out above:—]

By this section musical compositions of every kind were brought within this and the former Act, and the author of them acquired the double right before referred to, viz., first, that of copyright proper in the piece itself as a book; continuing (in the case of every book published after the passing of the Act in its author's lifetime) until the expiration of seven years from the death of the author, or forty-two years from the first publication of the book, whichever period should be the longer; and second, that of acting right or performing right, continuing until the expiration of the seven years from the death of the author or forty-two years from

the first public representation or performance of the piece, [* 239] whichever * should be the longer. These rights are quite distinct, each being a separate property, and each capable of being assigned without the other; and they would or might expire at different times, except in the case of the book being first published, and the piece being first publicly performed on the same day.

Now, it is contended for the defendant, that the fact of the publication for sale of a musical composition as a book prevents the subsequent acquisition or enjoyment of the acting or performing right. Why should it do so? It is said that no one would buy such a piece if the purchaser could not use the piece he paid for, and therefore that the sale of the piece necessarily carries with it the right to make such use of it as the purchaser thinks fit. But this consequence does not follow; for it is only the performance of the piece in public, that under the section I have just read the existence of the acting or performing right prevents; and it is obvious that the greater number of sales of musical pieces take place to persons for private use and without having any public performance in contemplation.

In the next place, I think, that if the publication of a musical composition as a book before the piece had been publicly performed prevented the subsequent acquisition of any acting or

performing right, it must follow that the publication of the same composition as a book at any time after the piece had been publicly performed, would from that time forward put an end to any acting or performing right in the piece existing prior to such publication, for the reasons existing in the former case would be of equal weight in the latter. If so, the defendant's contention comes in short to this, that the enjoyment of, or the power of acquiring, the acting or performing right is determined by the publication of the book at any time; and the author must choose whether he will abstain from publishing the book, and thus be unable to reap the benefit of the copyright therein which the Act confers upon him, in which case he can enjoy the acting right; or whether he will publish the book, and lose thereby the acting or performing right. I cannot find anything in the Act, or in reason, to support this contention. Definite periods of duration for the two rights are given by the Act, and I cannot come to the * conclusion that those periods are cut short by any [* 240] conditional limitation unless it can be found in the Act itself, and I have not had pointed out to me nor have I discovered any words pointing to that conclusion.

But the case does not rest here. The Act does, in my opinion, directly show upon its face that the publication of the piece as a book does not prevent the continuance of the acting or performing right. The 22nd section of the Act is as follows. [His Lordship read the section as above set out.] That section recognises the two rights as existing simultaneously, and I think it impossible for me to read that section as confined to the case of books which have not been published. I read the word "book" there as including books published as well as unpublished; especially when I see that the section provides for an entry in the registry book of the assignment, and this implies that the copyright referred to by the section has already been registered, and registration under the Act can only take place after publication, the date of which must appear in the first entry in the registry book. Moreover, I think that the word "assignee" in that section must receive the same construction as the word "assign" in the interpretation clause, by which that word is made to include every person in whom the interest of an author in copyright is vested, whether derived from the author before or after the publication of the book.

Before passing from that section, I would mention that it appears to have been framed to obviate the consequences of the decision in *Cumberland v. Planché*, 1 Ad. & E. 580, which case held that an assignment of the copyright in a dramatic piece had the effect of assigning the acting right also. In that case the piece had been already printed and published, and, therefore, if the contention of the present defendant is sound, the acting right, which was the subject of the decision, had no existence in fact. This point does not seem to have occurred to Sir F. Pollock or Sir James Scarlett, who argued the case, or to any of the four Judges who decided it.

In coming to the conclusion above expressed as to the [* 241] present * state of the law, which is at variance with that propounded in the Digest before referred to, I think that the Digest shows how the error, which in my opinion exists in it, has arisen. The 14th article, which I have read, has a note to it to the effect that the proposition contained in it seems to be involved in the 1st section of the Act 3 & 4 Will. IV. c. 15, the effect of which was given in the 13th article. The 13th article says, to put it shortly, that the author of any dramatic piece or musical composition not printed and published by the author has the sole right of representing the piece for the periods therein mentioned. If this were the whole of the 1st section of that Act, and no other section or statute bore upon the subject, it would be difficult to find fault with the conclusions arrived at in the 14th article; as, if the performing right were the mere creature of the statute, and the statute created it only in the case of pieces not printed and published, it would follow that it could not be acquired in pieces which had already been printed and published. But the statute provided, as I have already pointed out, for two different cases, namely, first, for the case of pieces not printed or published; and secondly, for that of pieces printed and published after the passing of that Act, or within ten years before its passing; and the Digest seems, for some reason which I do not understand, to ignore this second case altogether.

With respect to the 16th article of the Digest, that “a dramatic piece or musical composition published as a book may (it seems probable) be publicly represented without the consent of the author or his assigns,” I confess my inability to agree with it. It is stated in a foot-note by the learned author of the Digest

that the only authority he has been able to find on the point is that of *Murray v. Elliston* (p. 868, *ante*), 5 B. & Ald. 657 (24 R. R. 519), which seems to imply the proposition contained in the article. But that case was decided in the year 1822, many years before the passing of the Act 3 & 4 Will. IV. c. 15, which Act was the first to create an acting right, and was intended to alter and amend the law which existed when the case of *Murray v. Elliston* was decided. If that case had been decided after the Act instead of before it, the decision must have been the other way; unless, indeed, it had been held that the * alterations made [* 242] in adapting the piece for the stage had rendered it a new work, in which case it would not have been any authority for the proposition contained in article 16.

Under these circumstances I allow the demurrer in the usual manner.

ENGLISH NOTES.

The distinction between the exclusive right to dramatic or musical representation and copyright in a book is further exemplified by the case of *Clark v. Bishop* (1872), 25 L. T. 908. The plaintiff was the assignee of the right to perform a certain comic song. The plaintiff had never registered the song nor published it otherwise than by singing it in character on a music-hall platform. The defendant had, without the consent of the plaintiff, printed and published the song in a penny book. The plaintiff having obtained a verdict with £10 damages, the defendant moved to set it aside on the ground that the plaintiff had published the song within the meaning of the Act 5 & 6 Vict. c. 45, (which by s. 20 extended the protection of the Act of 3 & 4 Will. IV. c. 15, to "musical compositions," and extended the duration of the term of protection to a dramatic piece or musical composition so as to be the same as that given by the Act of Victoria to a "book"), and had not registered it within the Act. The Court, by a majority, held that the plaintiff's song was not a "book" within the meaning of the Act 5 & 6 Vict., but a "dramatic piece" or "musical entertainment," and that it did not require registration within sect. 24 of the Act, which applied to "books" only. The decision was however confined to the point raised as to the registration, and the Judges guarded themselves from saying that the publication as a book was an infringement, a point which, as KELLY, C. B., observed, seems to have been evaded at the trial.

No. 5. — *Ex parte Hutchins and Romer*, 4 Q. B. D. 483, 484. — Rule.

NO. 5. — EX PARTE HUTCHINS AND ROMER.

(C. A. 1879.)

RULE.

ALTHOUGH copyright (properly so called) and the exclusive right of representation or public performance in a musical composition are distinct and separate rights, the assignment by the author of a song, of his copyright, and also "the sole and exclusive liberty of printing and publishing the same, . . . and all other his estate, right, title, interest, property, &c.," in the composition, transfers the right of representation as well as the copyright properly so called.

Ex parte Hutchins and Romer.

4 Q. B. D. 483-490 (s. c. 48 L. J. Q. B. 505; 41 L. T. 144; 27 W. R. 857).

Copyright. — Musical Representation. — Assignment of Rights.

[483] The Act 5 & 6 Vict. c. 45 (which by s. 20 incorporates 3 & 4 Wm. IV. c. 15, and extends its provisions to musical compositions), confers an exclusive right to the performance of musical compositions published within ten years before the passing of the Act.

Within ten years before the passing of 5 & 6 Vict. c. 15, C. set to music two songs, and in 1843, after the passing of that statute, he by deed assigned to D. and M. his "copyright" in the two musical compositions, together with all "property" and "benefit" therein. The interest of D. and M. in the musical compositions afterwards vested in H. & R. In 1878 C. purported to assign to A. "the sole liberty of performing or singing, or causing or permitting to be performed or sung," the musical compositions. A. thereupon caused entries to be made in the register at Stationers' Hall, representing him to be the sole proprietor of the liberty of performing the musical compositions:—

Held, upon motion by H. & R., that the entries must be expunged; for C., by the deed made in 1843, had granted the sole liberty of performing the musical compositions to D. & M., and therefore could not in 1878 grant it to A.

Appeal of J. F. Adams from an order of COCKBURN, C. J. and MELLOR, J., expunging certain entries in the book of [* 484] registry * kept at the hall of the Stationers' Company.

The facts are set out in the report of the proceedings before the Queen's Bench Division (4 Q. B. D. p. 90), and it is only necessary to state here the following circumstances:—

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About 1835 or 1836 two songs or poems, named respectively “Kathleen Mavourneen” and “Dermot Astore,” were written by a Mrs. Crawford; they were afterwards set to music by Crouch. By a deed made in 1843, between Crouch of the one part and T. D’Almaine and T. G. Mackinlay of the other, after reciting that Crouch had written certain musical compositions (which included “Kathleen Mavourneen” and “Dermot Astore”), and had agreed to sell them to D’Almaine and Mackinlay, he, for valuable consideration, assigned unto them “all the present and future vested and contingent copyright of him, the said F. W. N. Crouch, of and in the said books, pieces, or compositions of music, . . . and the sole and exclusive right and liberty of printing or otherwise multiplying copies thereof, and of every or any part thereof, and of publishing the same and every part thereof, under and by virtue of an Act of Parliament passed in the sixth year of the reign of her Majesty Victoria, intituled, ‘An Act to amend the Law of Copyright,’ and under or by virtue of an Act of Parliament passed in the 54th year of the reign of his late Majesty, George III., intituled, “An Act to amend the several Acts for the encouragement of learning by securing the copies and copyright of printed books to the Authors of such Books or their Assigns,” and every or any preceding Act or Acts of Parliament, as also by common law or otherwise; together with the sole and exclusive privilege of vending or causing the same books, pieces, or compositions of music, and every part thereof, and the copies thereof and of every part thereof, to be sold, and all other the estate, right, title, interest, property, contingency, possibility, benefit, claim, and demand whatsoever, both at law and in equity, of him, the said F. W. N. Crouch, of and in the said books, pieces, or compositions of music, and every part thereof; to have, hold, receive, take, and enjoy the said books, pieces, or compositions of music aforesaid and copyright, and all and singular other the premises hereby bargained, sold, and assigned, or intended so to be, * with their and every of their rights and priv- [*485] ileges unto and by the said T. D’Almaine and T. G. Mackinlay their executors, administrators, or assigns, for their own absolute use and benefit in as full, ample, exclusive, and beneficial a manner to all intents and purposes, as he, the said F. W. N. Crouch, could or might have held or enjoyed the same in case these presents had not been made.” All the interest of D’Almaine

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and Mackinlay in the two musical compositions afterwards vested in C. L. Hutchins and F. Romer. In August, 1878, Crouch assigned to J. F. Adams "the sole liberty of performing or singing, or causing or permitting to be performed or sung" the two musical compositions. J. F. Adams caused four entries, dated the 19th of September, to be made in the book of registry at Stationers' Hall, which in effect alleged that Crouch, as proprietor, had assigned to him the liberty of representation, and two others, dated the 21st of August, and stating that Crouch and Adams had agreed to except the benefits of 5 & 6 Vict. c. 45, for the extension of the term of liberty of performance.

C. H. Turner, for the appellant Adams. The Judges of the Queen's Bench Division were wrong in holding that 5 & 6 Vict. c. 45¹ did not confer any exclusive right to the perform-

¹ By 5 & 6 Vict. c. 45, s. 3, "The copyright in every book which shall after the passing of this Act be published in the lifetime of its author shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns: Provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years; and that the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns."

Sect. 4. "And whereas it is just to extend the benefits of this Act to authors of books published before the passing thereof, and in which the copyright still subsists; be it enacted that the copyright which at the time of passing this Act shall subsist in any book theretofore published (except as hereinafter mentioned) shall be extended and endure for the full term provided by this Act in cases of books thereafter published, and shall be the property of the person who at the time of passing of this Act shall be the proprietor of such copyright: Provided

always that in all cases in which such copyright shall belong in whole or in part to a publisher or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by this Act, but shall endure for the term which shall subsist therein at the time of passing of this Act and no longer, unless the author of such book, if he shall be living, or the personal representative of such author, if he shall be dead, and the proprietor of such copyright shall, before the expiration of such term, consent and agree to accept the benefits of this Act in respect of such book, and shall cause a minute of such consent in the form in that behalf given in the schedule to this Act annexed to be entered in the book of registry hereinafter directed to be kept, in which case such copyright shall endure for the full term by this Act provided in cases of books to be published after the passing of this Act, and shall be the property of such person or persons as in such minute shall be expressed."

Sects. 2, 14, 20 (which incorporates 3 & 4 Wm. IV. c. 15, and extends its provisions to musical compositions), and 22 are set out or sufficiently referred to in a note, *ante*, pp. 90, 91.

By 3 & 4 Wm. IV. c. 15, s. 1, "From and after the passing of this Act the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece

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ance of * musical compositions published before it was [* 486] passed. Their attention was perhaps insufficiently directed to s. 20, which incorporates 3 & 4 Wm. IV. c. 15, and extends it to musical compositions. 5 & 6 Vict. c. 45 has a retrospective effect, and as the musical compositions in question were written less than ten years before it was passed, Adams is entitled, under the assignment of August, 1878, to the sole liberty of performance. Perhaps it was unnecessary to register it; but the registration rendered * the proof of Adams's title [* 487] more easy. For the respondent's reliance may be placed upon the deed of 1843, whereby Crouch purported to grant to D'Almaine and Mackinlay the copyright of the musical compositions; but this was insufficient to pass the right of performance, for no entry was made in the registry book as required by 5 & 6 Vict. c. 45, s. 22; and even if the entry be not requisite the assignment being by deed, the right of performance is not expressly mentioned, and it cannot pass under the general words, for they are governed by the rule as to *verba ejusdem generis*, and can refer only to the incidents of the copyright mentioned in the operative words. *Reg. v. Cleworth*, 4 B. & S. 927; S. C. *sub nom. Reg. v. Silvester*, 33 L. J. M. C. 79. The counsel for the respondents may rely upon *Lucy v. Rhys*, 4 B. & S. 873; 33 L. J. Q. B. 157, but in that case the "acting right" was expressly assigned. At all events Adams is entitled to retain the entries dated the 21st of August, 1878; they were made in order to

or entertainment composed and not printed or published by the author thereof or his assignee, or which hereafter shall be composed, and not printed or published by the author thereof or his assignee, or the assignee of such author shall have as his own property the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment whatsoever in any part of the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey, and Guernsey, or in any part of the British dominions, any such production as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof; and the author of any such production, printed and published within ten

years before the passing of this Act by the author thereof or his assignee, or which shall hereafter be so printed and published, or the assignee of such author shall, from the time of passing this Act, or from the time of such publication respectively until the end of twenty-eight years from the day of such first publication of the same, and also if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property the sole liberty of representing or causing to be represented the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof."

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extend the period of copyright pursuant to the proviso in 5 & 6 Vict. c. 45, s. 4.

[BRAMWELL, L. J. That proviso is not in point; no copyright subsisted in these musical compositions when that Act was passed; and if the deed of 1843 effectually assigned the liberty of performance, Adams could not acquire it from Crouch in 1878.]

F. W. Raikes, for the respondents Hutchins and Romer. It is submitted that 5 & 6 Vict. c. 45, is not retrospective, and that the ground of the decision in the Queen's Bench Division was right; the statute is of a penal nature and ought to be construed strictly. If, however, this contention cannot be sustained, then it is submitted that by the deed of 1843 the liberty of performance was effectually vested in D'Almaine and Mackinlay; s. 22 relates to assignments by entry in the registry book; it was not intended to apply to assignments by deed.

C. H. Turner, replied.

BRAMWELL, L. J. I think that the order of the Queen's Bench Division must be affirmed, but not upon the ground upon which this case was decided by that Court. The construction of 5 & 6 Vict. c. 45 was not properly brought before the Judges of the Queen's Bench Division, and somehow the force of s. 20 [* 488] seems to *have escaped notice. That enactment has manifestly a retrospective effect, for it incorporates 3 & 4 Wm. IV. c. 15, and extends its benefits to musical compositions. It has been argued that the statute ought not to be construed retrospectively, because it is of a penal nature; but the answer is that it does not inflict penalties for acts done before it was passed. I think, therefore, that the view of the Queen's Bench Division as to whether the statute was retrospective cannot be maintained. The decision, however, must be affirmed upon the ground that at the time when the entries sought to be expunged were made, Crouch had parted with his interest in the musical compositions. It may be that there is a difference between a book and the right to perform a musical composition: the former is a chattel, the latter does not exist in a material shape. The question turns upon the language of the deed made in 1843; the copyright in the songs is assigned together with all "interest, property, contingency, possibility, benefit," in the musical compositions. I think that the right to perform the musical compositions was included in the words "interest, property, benefit;"

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for Crouch was the only person who could license their performance. These words are very general, and no doubt were intended to have a wide operation; we are now asked to limit their meaning. I do not think that we ought to do so. The entries in the Book of Registry must be expunged. I wish to add that owing to 5 & 6 Vict. c. 45, s. 22, perhaps *Cumberland v. Planché*, 1 A. & E. 580, is not now law; but here other words than "copyright" are used.

BRETT, L. J. I think that the statute 5 & 6 Vict. c. 45, is retrospective: by s. 20 it incorporates 3 & 4 Wm. IV. c. 15, and extends its provisions to musical compositions. The latter Act applies to dramatic pieces published ten years before it was passed, and therefore, even if 3 & 4 Wm. IV. c. 15 is to be considered as enacted with reference to musical compositions only from the 1st of July, 1842, when 5 & 6 Vict. c. 45 was passed, it will apply to the musical compositions "*Kathleen Mavourneen*," and "*Dermot Astore*," which were composed within ten years before the 1st of July, 1842. Sect. 28 of 5 & 6 Vict. c. 45 was intended * to preserve contracts and obligations pre- [* 489] viously entered into, and does not extend to this case. Therefore 5 & 6 Vict. c. 45 has a retrospective effect with regard to musical compositions, and the ground of the decision in the Queen's Bench Division was erroneous; but the order appealed from must be upheld, because in 1868 when Crouch purported to assign the liberty of performance he was not the proprietor of it; for before he assumed to pass the liberty of performance to Adams, he had granted it to D'Almaine and Mackinlay, through whom Hutchins and Romer claim. By the statutes relating to copyright a distinction has been drawn between the liberty of performing a dramatic piece or musical composition and the copyright in the book containing it, and we are bound to assume that this was done intentionally. The question turns upon the construction of the deed made in 1843; by the operative words Crouch sold and assigned to D'Almaine and Mackinlay the copyright in the musical compositions, and the sole and exclusive right of multiplying copies thereof together with the exclusive privilege of selling the same, "and all other the estate, right, title, interest, property, contingency, possibility, claim, and demand whatsoever, both at law and in equity," of Crouch. In my opinion the right to exclusive performance passed under the

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word "property," and also, I incline to think, under the word "benefit." It has been argued that this construction ought not to be adopted, because these are general words coming after particular words dealing with the copyright only, and that the rule as to the interpretation of *verba ejusdem generis* must be followed. I very much doubt whether that rule applies to deeds, because they are to be construed most strongly against the grantor; but a decisive reason for not applying that rule is that the words "property" and "benefit" are not in immediate sequence to the assignment of the copyright, but are introduced by the phrase "together with:" I think that the parties plainly intended that the words "property" and "benefit" should pass something different from and additional to what passed by the transfer of the copyright. For these reasons it appears to me clear that after the execution of the deed of 1843 the right of performance did not remain in Crouch, and that he had no interest which he could sell to Adams.

All the entries in question in this case must be struck out.

[*490] * COTTON, L. J. I think that 5 & 6 Vict. c. 45 had a retrospective operation, and that it did apply to musical compositions published within ten years before it was passed. However, the order of the Queen's Bench Division must be affirmed, because at the time when Adams got an assignment of the sole liberty of performing or singing from Crouch, the latter had previously transferred it to D'Almaine and Mackinlay. The right of exclusive performance of a musical composition is entirely created by statute, and is declared to be the property of the author. By 5 & 6 Vict. c. 45, s. 22, it is enacted that the assignment of the copyright in a book containing a dramatic piece or musical composition shall not convey the right of performing it, unless the intention of the parties that the right of performance shall be assigned is expressed by an entry in the registry book; but I incline to think that this enactment was not meant to control the operation of deeds of assignment, but only to regulate the effect of entries in the registry book. Looking to the deed of 1843 itself, I think that its terms are wide enough to convey to D'Almaine and Mackinlay the liberty of performance; the general words, especially "property" and "benefit" are sufficiently sweeping to include every advantage which was vested in Crouch with respect to these musical compositions.

For Adams it has been argued that, even if the entries of the

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19th of September ought to be expunged, he is nevertheless entitled to retain those of the 21st of August, representing that Crouch and Adams had agreed to accept the benefits of 5 & 6 Vict. c. 45 for the extension of the term of liberty of performance; and reliance was placed upon the proviso in s. 4 of that statute. I do not think that it applies to the present case; it referred to copyright subsisting at the time when it was passed; but the exclusive liberty of performing a musical composition was introduced by that statute.

All the entries were wrongfully made, and must be expunged.

Appeal dismissed.

ENGLISH NOTES.

The author of a dramatic piece, having assigned the provincial rights therein, cannot, without the concurrence of the assignee, maintain an action against the infringer of those rights. *Tree v. Bowkett* (KEKEWICH, J., 4 Feb. 1896), 74 L. T. 77.

To conclude the subject of dramatic copyright it is perhaps necessary to mention two recent Acts which have been passed in consequence of the too frequent employment of the Acts against persons who have unintentionally infringed them.

By the 45 & 46 Vict. c. 40, Copyright (Musical Compositions) Act, 1882, it is provided that the proprietor who wishes to retain the right of exclusive public representation must notify the same in the prescribed manner.

And by 51 & 52 Vict. c. 17, Copyright (Musical Compositions) Act, 1888, the Judge trying a case of infringement is allowed a discretion, in the case of a performance elsewhere than at a place licensed for public entertainment, to impose nominal damages; and the costs are to be in the discretion of the Court. By the same Act, the proprietor, tenant, or occupier of a place of dramatic entertainment is not to be held responsible for an unauthorised performance unless he wilfully permitted the performance, knowing it to be unauthorised.

AMERICAN NOTES.

This doctrine is approved by Drone (Copyright, p. 622), citing *Cumberland v. Planché*, 1 Ad. & El. 580.





NOTES

ON

ENGLISH RULING CASES

CASES IN 9 E. R. C.

9 E. R. C. 1, *THORLEY v. KERRY*, 13 Revised Rep. 626, 4 Taunt. 355.

What constitutes libel.

Cited in *White v. Nichols*, 3 How. 266, 11 L. ed. 591; *Hillhouse v. Dunning*, 6 Conn. 391; *Rice v. Simmons*, 2 Harr. (Del.) 417, 31 Am. Dec. 766,—holding that any publication which tends to disgrace a man or bring him into contempt or ridicule is a libel per se, though not slanderous; *Jones v. Greeley*, 25 Fla. 629, 6 So. 448, holding that anything published of and concerning a person which tends to bring him into ill repute and destroy the confidence of neighbors in his integrity is actionable and libelous per se; *State v. Powell*, 66 Mo. App. 598, holding to charge a person with the procurement of false affidavits for the purpose of preventing the appointment of an applicant to a position of trust and profit is libelous; *Levey v. Brooklyn Union Pub. Co.* 65 Misc. 373, 121 N. Y. Supp. 643, holding that “accelerator” as applied to plaintiff in newspaper article, denoting dishonesty, or double dealing, is libelous per se; *State v. Smily*, 37 Ohio St. 30, 41 Am. Rep. 487, holding publication that the house of a person has been searched under legal process for the discovery of goods recently stolen, and secreted therein, was libel; *McBride v. Ellis*, 9 Rich. L. 313, 67 Am. Dec. 553, holding an obituary notice of one living, if conceived and published falsely and maliciously is a libel; *Connick v. Wilson*, 4 N. B. 617, holding that written slander is actionable without imputing a crime punishable by law, if it contain matter which tends to vilify and degrade the person who is the object of it.

Distinguished in *McLoughlin v. American Circular Loom Co.* 60 C. C. A. 87, 125 Fed. 203, holding that a publication tending to injure business was not actionable per se, but is actionable if special damage is alleged and proved.

— Words libellous but not slanderous.

Cited in *Prosser v. Callis*, 117 Ind. 105, 19 N. E. 735, holding that it is not necessary that the words used in a published article be slanderous, to maintain the action for libel; *Williams v. Riddle*, 145 Ky. 459, 36 L.R.A.(N.S.) 975, 140 S. W. 661, Ann. Cas. 1913B, 1151, on defamatory matter which is *prima facie* libelous if written, not being actionable slander if spoken except upon proof of special injury or damage; *Tillson v. Robbins*, 68 Me. 295, 28 Am. Rep. 50, holding that much which is spoken would not be actionable without averment of extrinsic fact or allegation, and proof of special damage is actionable per se if written; *Haynes v. Clinton Printing Co.* 169 Mass. 512, 48 N. E. 275, holding printed words which have a manifest tendency to seriously hurt the person's reputation are libelous though they would not have been if spoken; *Winchell v.*

Argus Co. 69 Hun, 354, 73 N. Y. Supp. 650, holding that in order to maintain an action for spoken words, they must charge an indictable offense but as to written words, if they simply subject the person to ridicule, contempt and hatred, they are actionable; Merchants' Ins. Co. v. Buckner, 39 C. C. A. 19, 98 Fed. 222; Cooper v. Greeley, 1 Denio, 347; Stone v. Cooper, 2 Denio, 293,—on the distinction between oral and written slander: Barron v. Smith, 19 S. D. 50, 101 N. W. 1105, holding an action will lie for written slander when one will not for the same words when spoken.

Necessity of proving special damages in action of slander.

Cited in Darling v. Clement, 69 Vt. 292, 37 Atl. 779, holding that words imputing bad financial credit are not actionable as slander without proof of special damage.

Civil liability for offenses punishable criminally.

Cited in Huber v. Teuber, 3 MacArth. 484, 36 Am. Rep. 110; Austin v. Wilson, 4 Cush. 273, 50 Am. Dec. 766; Pegram v. Stortz, 31 W. Va. 220, 6 S. E. 485,—on the right to recover punitive damages in an action for an injury which is also punishable by indictment.

9 E. R. C. 16, PARKES v. PRESCOTT, 38 L. J. Exch. N. S. 105, L. R. 4 Exch. 169, 20 L. T. N. S. 537, 17 Week. Rep. 773.

Liability for libel published by third party by direction.

Cited in Washington Gaslight Co. v. Lansden, 9 App. D. C. 508, holding that where the data for a libelous article is furnished by the general manager of a corporation, with knowledge that such data is to be used, the corporation will be liable; Weston Electric Instrument Co. v. Benecke, 82 N. J. L. 445, 82 Atl. 878, Ann. Cas. 1913D, 11, holding that one who causes or procures libel to be published in newspaper is responsible therefor; Fenton v. Macdonald, 1 Ont. L. Rep. 422, on the liability of person for publication of slander by some third party under his direction.

Cited in notes in 43 L.R.A.(N.S.) 3, on criminal liability of master for servant's act; 41 L.R.A. 654, on criminal and penal liability for act of copartner, servant, or agent.

9 E. R. C. 32, EMMENS v. POTTLE, 50 J. P. 228, 55 L. J. Q. B. N. S. 51, 53 L. T. N. S. 808, L. R. 16 Q. B. Div. 354, 34 Week. Rep. 116.

Accidental publication of libel.

Cited in Street v. Johnson, 80 Wis. 455, 14 L.R.A. 204, 27 Am. St. Rep. 42, 50 N. W. 395, holding that one who sells and delivers paper containing libel is presumed to know that it contains the libel; R. v. Judd, 37 Week. Rep. 143, on the civil liability of the directors of one company who printed a newspaper containing libelous matter, for another company to publish; R. v. Munslow [1895] 1 Q. B. 758, 64 L. J. Mag. Cas. N. S. 138, 15 Reports, 192, 72 L. T. N. S. 301, 43 Week. Rep. 495, 18 Cox, C. C. 112, on the accidental publication of a libel as being a sufficient publication to support action.

Cited in Benjamin Sales 5th ed. 456, on nonliability for negligence in absence of duty towards party injured.

Distinguished in Vizetelly v. Mudie's Select Library [1900] 2 Q. B. 170, 69 L. J. Q. B. N. S. 645, 16 Times L. R. 352, holding that the proprietors of a circulating library were the publishers of a libel contained in a book, where it was through negligence on their part that they did not know it contained the libel.

9 E. R. C. 39, *DAWKINS v. ROKEBY*, 45 L. J. Q. B. N. S. 8, L. R. 7 H. L. 744, 33 L. T. N. S. 196, 23 Week. Rep. 931, aff'g the decision of the Court of Exchequer reported in L. R. 8 Q. B. 255, 42 L. J. Q. B. N. S. 63, 21 Week. Rep. 544, 28 L. T. N. S. 134.

Privileged defamatory communications or statements.

Cited in *Vogel v. Gruaz*, 116 U. S. 311, 28 L. ed. 158, 4 Sup. Ct. Rep. 12, holding that communication to state's attorney by person who inquires whether facts communicated make out case of larceny, is privileged; *Worthington v. Scribner*, 109 Mass. 487, 12 Am. Rep. 736, holding that in action for maliciously and falsely representing to treasury department that plaintiff was intending to defraud the revenue, defendant cannot be compelled to answer interrogatories as to whether or not he gave information as to alleged fraud; *Foster v. Scripps*, 39 Mich. 376, 33 Am. Rep. 403, on what constitutes privileged communications; *Langelier v. White*, Rap. Jud. Quebec, 5 C. S. 94, holding under statute action for damages on ground of defamation does not lie for having published true report of sittings of senate committee and having made editorial comment thereon.

Cited in note in 4 L.R.A.(N.S.) 1104, on liability for giving or refusing information affecting servant's character or reputation.

—In judicial proceedings.

Cited in *Harlow v. Carroll*, 6 App. D. C. 128, holding that false and defamatory matter contained in an answer to a bill in equity, if not relevant to the issues, is not privileged; *Hunkel v. Voneiff*, 69 Md. 179, 9 Am. St. Rep. 413, 14 Atl. 500, holding that no action for slander will lie for what a witness says in a judicial proceeding though it may be false and malicious; *Maulsby v. Reifsnider*, 69 Md. 143, 14 Atl. 505, holding same as to statements made by counsel, if pertinent to the subject-matter of the inquiry; *Maurice v. Worden*, 54 Md. 233, 39 Am. Rep. 384 (dissenting opinion), on privilege of statement by witness although made in bad faith and without probable cause; *Schaub v. O'Terrall*, 116 Md. 131, 39 L.R.A.(N.S.) 416, 81 Atl. 789, Ann. Cas. 1913C. 799, holding that witness is not liable in civil action for giving perjured testimony in pursuance of conspiracy, which deprives one of property; *Rice v. Collidge*, 121 Mass. 393, 23 Am. Rep. 279, on the right to maintain an action for slander on statements made by witnesses during course of a trial in court; *Jones v. Brownlee*, 161 Mo. 258, 53 L.R.A. 445, 61 S.W. 795, holding that no action for libel can be maintained on a defamatory statement contained in a pleadings in a civil action, if it is relevant and pertinent, and the court have jurisdiction; *Johnson v. Brown*, 13 W. Va. 71, holding that libelous matter published only in due course of legal procedure, cannot be basis of libel suit, provided court had jurisdiction of cause and they were pertinent to suit; *Henderson v. Scott*, 24 N. S. 232, holding that no action for slander may be maintained for words given as testimony during the course of judicial proceedings; *Cooper v. Phipps*, 24 Or. 357, 22 L.R.A. 836, 33 Pac. 985, holding same, but this is not true where the statements were falsely and maliciously made and not pertinent to the issue and not in response to questions asked by counsel; *Lowther v. Baxter*, 22 N. S. 372, holding that words in letter written to magistrate, which are not relevant to judicial proceedings are not privileged; *Hibbard v. Cullen*, Rap. Jud. Quebec, 3 C. S. 463, on privilege of witness giving malicious testimony.

Cited in notes in 22 L.R.A. 650, on libel by defamatory words in pleading; 22 L.R.A. 837, 838, on privilege of witness as to defamatory testimony; 7 E. R. C.

727, 728, on liability of advocate or attorney for defamatory words used in judicial proceeding.

—Non-judicial public investigations.

Cited in *Blakeslee v. Carroll*, 64 Conn. 223, 25 L.R.A. 106, 29 Atl. 473, holding that words uttered as testimony before an investigating committee were absolutely privileged, though the committee had exceeded the scope of its authorized investigation; *De Arnaud v. Ainsworth*, 24 App. D. C. 167, 5 L.R.A.(N.S.) 163, holding that handing to another copy of senate document containing report of official of War Department adverse to claims for medal of honor for distinguished service in army is not libelous; *Wright v. Lothrop*, 149 Mass. 385, 21 N. E. 963, holding that a statement made before a legislative committee was a privileged communication; *Waterbury v. Dewe*, 16 N. B. 670, holding that inspector without authority to make investigation as to charges against postal clerk, cannot claim privilege for false report.

Cited in note in 5 L.R.A.(N.S.) 166, on report of executive or administrative officer as privileged.

Non-liability of public officer for acts done in course of official duties.

Cited in *Spalding v. Vilas*, 161 U. S. 483, 40 L. ed. 780, 16 Sup. Ct. Rep. 63, on the immunity of public officers from actions for damages for acts done in the course of their official duties.

Person in military service as subject to military authorities.

Cited in *Holbrow v. Cotton*, 9 Quebec L. R. 105, on a person in the military service as being subject to military authorities and tribunals.

Cited in note in 1 Eng. Rul. Cas. 786, 787, on nonliability of superior in command for acts injurious to inferior.

9 E. R. C. 55, *TOOGOOD v. SPYRING*, 1 Crompt. M. & R. 181, 3 L. J. Exch. N. S. 347, 4 Tyrw. 582.

Privileged communications.

Referred to as a leading case in *Holbrow v. Cotton*, 9 Quebec L. R. 105, on subject of privileged communications.

Cited in *Jones & Co. v. Townsend*, 21 Fla. 431, 58 Am. Rep. 676, holding that a published statement that a candidate was a retail liquor dealer, and that they were informed he was under indictment, when he was not, was not privileged; *Com. v. Pavitt*, 14 W. N. C. 27, 2 Del. Co. Rep. 16, holding a letter to the prosecutor's attorney saying that the prosecutor had bought a horse for the purpose of cheating someone, was a privileged communication; *Swan v. Tappan*, 5 Cush. 104, holding that letter containing a criticism of a copyrighted book if honestly made, and there was a reasonable occasion therefor, is privileged; *Quinn v. Scott*, 22 Minn. 456; *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360,—holding a communication, fairly made by a person in the discharge of some private or public duty, legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned is privileged; *Byam v. Collins*, 39 Hun, 204, holding that fact that communication is founded on motives of friendship and love does not make it privileged; *Briggs v. Garrett*, 111 Pa. 404, 56 Am. Rep. 274, 2 Atl. 513, 17 W. N. C. 129, 43 Phila. Leg. Int. 99, holding a statement by respectable citizen in a public meeting, that a candidate for office is a person of ill repute so as to make him undesirable for office, is privileged, though false; *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. 474, on the rule as to privileged communications; *Strode v. Clement*, 90 Va. 553, 19 S. E. 177, holding that where the party makes

the communication in performance of a duty, legal or social, or in defense of his own interests, it is privileged; *Eikhoff v. Gilbert*, 124 Mich. 353, 51 L.R.A. 451, 83 N. W. 110 (dissenting opinion); *Brown v. Norfolk & W. R. Co.* 100 Va. 619, 60 L.R.A. 472, 42 S. E. 664,—on what constitutes a privileged communication; *Logan v. Hodges*, 146 N. C. 38, 59 S. E. 349, 14 Ann. Cas. 103, holding that person claiming that communication is privileged must show that it is brought within exception to general rule against libelous publications; *Com. v. Pavitt*, 16 Phila. 478, 40 Phila. Leg. Int. 454, holding that letter written by defendant to prosecutor's attorney, in answer to letter from attorney threatening suit, saying that prosecutor bought horse to cheat someone with, was privileged; *Howe v. Lees*, 11 C. L. R. (Austr.) 361, holding that report by secretary to members of stock yard association in relation to financial conditions of customer is privileged; *Waterbury v. Dewe*, 19 N. B. 225 (dissenting opinion), on what constitutes privileged communications; *Macintosh v. Dun* [1908] A. C. 390, 2 B. R. C. 203, 77 L. J. P. C. N. S. 113, 99 L. T. N. S. 64, 24 Times L. R. 705, 52 Sol. Jo. 580, holding that communication as to commercial standing of person, is not privileged if made from motives of self-interest; *Tench v. Great Western R. Co.* 32 U. C. Q. B. 452, holding that posting of hand-bill by general managers of railway company, stating that plaintiff, a conductor had been discharged for dishonest conduct, was not privileged; *Henwood v. Harrison*, L. R. 7 C. P. 606, 41 L. J. C. P. N. S. 206, 26 L. T. N. S. 938, 20 Week. Rep. 1000, holding that a fair criticism on a matter of public and national importance is privileged; *Hamon v. Falle*, L. R. 4 App. Cas. 247; *Capital & Counties Bank v. Henty*, L. R. 7 App. Cas. 741, 52 L. J. Q. B. N. S. 232, 47 L. T. N. S. 662, 31 Week. Rep. 157, 47 J. P. 214,—on what constitutes a privileged communication; *Stuart v. Bell* [1891] 2 Q. B. 341, 60 L. J. Q. B. N. S. 577, 64 L. T. N. S. 633, 39 Week. Rep. 612, holding that a privileged communication is one made on a privileged occasion and fairly warranted by it, and not proved to have been made maliciously.

Cited in notes in 20 L.R.A.(N.S.) 362, on libel and slander: privilege as affected by extent of publication: 4 L.R.A.(N.S.) 1099, 1105, 1112, 1117, on liability growing out of giving or refusing information affecting character or reputation of servant.

Distinguished in *Holliday v. Ontario Farmers' Mut. Ins. Co.* 1 Ont. App. Rep. 483, holding that a publication in a newspaper that the plaintiff was no longer an agent of the defendant notwithstanding his fraudulent representations to the contrary, was not a privileged communication.

—Qualified privilege.

Cited in *Lawson v. Hicks*, 38 Ala. 279, 81 Am. Dec. 49, on what constitutes a qualified privilege; *Cooglear v. Rhodes*, 38 Fla. 240, 56 Am. St. Rep. 170, 21 So. 109, holding that a qualified privilege exists where the person is so situated that it becomes right in the interest of society that he should tell a third person certain facts, and he does so, bona fide; *Gassett v. Gilbert*, 6 Gray, 94, holding that a warning published by a company that a certain person had been discharged by them, is privileged only so far as made in good faith and necessary to protect the public; *Brewer v. Chase*, 121 Mich. 526, 46 L.R.A. 397, 80 Am. St. Rep. 527, 80 N. W. 575, holding that an answer to a newspaper article must contain matter rebutting the charges made, or it will not be privileged; *Bacon v. Michigan C. R. Co.* 66 Mich. 166, 33 N. W. 181, holding that communications fairly warranted by any reasonable occasion, and honestly made, are privileged; *Cornelius v. Cornelius*, 233 Mo. 1, 135 S. W. 65, holding that qualified privilege

proceeds upon assumption that communication was honestly made, in belief that it was true, and with no motive of malice; *Briggs v. Garrett*, 17 Phila. 3, 41 Phila. Leg. Int. 14, holding that communication made by one voter to others in relation to candidate for public office, is privileged when plaintiff's case rebuts implication of malice; *Shurtleff v. Stevens*, 51 Vt. 501, 31 Am. Rep. 698, holding that a defamatory communication, fairly made in the discharge of some public duty, moral or social, is conditionally privileged, and depends upon malice; *Rude v. Nass*, 79 Wis. 321, 24 Am. St. Rep. 717, 48 N. W. 555, holding that a communication made to one having an interest and a right to know and act upon the facts therein stated is conditionally privileged.

— **Privileged occasions.**

Cited in *Stuart v. Bell* [1891] 2 Q. B. 341, 60 L. J. Q. B. N. S. 577, 64 L. T. N. S. 633, 39 Week. Rep. 612, holding that a privileged occasion is one which is held in point of law to rebut the implication of malice which would otherwise be made from the utterance of untrue defamatory matter; *Hebditch v. MacIlwaine* [1894] 2 Q. B. 54, 63 L. J. Q. B. N. S. 587, 9 Reports 452, 70 L. T. N. S. 876, 42 Week. Rep. 422, 50 J. P. 620, on what constitutes a privileged occasion; *Thorn v. Moser*, 1 Denio, 488, holding that action for words will not lie against party who speaks in performance of legal or moral duty without proof of express malice.

Distinguished in *Harrison v. Fraser*, 29 Week. Rep. 652, holding that where an employer suspected that one of his clerks was robbing him and he went to two disinterested persons and told them this and made enquiries as to it, the occasion was not privileged.

— **Responsiveness to inquiries or occasions.**

Cited in *Alabama & V. R. Co. v. Brooks*, 69 Miss. 168, 30 Am. St. Rep. 528, 13 So. 847, holding that a communication made in response to an inquiry for information, is privileged if it does not exceed the exigency of the occasion: *King v. Patterson*, 49 N. J. L. 417, 60 Am. Rep. 622, 9 Atl. 705; *Sunderlin v. Bradstreet*, 46 N. Y. 188, 7 Am. Rep. 322,—holding a report furnished by a mercantile agency with reference to the credit of a party is privileged only when made, and confined to those having an interest in the information; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803, holding that a reply which does not contain unnecessary defamatory matter, which is made to an attack made upon him by another, through a newspaper is privileged; *Waterbury v. Dewe*, 16 N. B. 670, holding that a statement made by a clerk in the post-office concerning the post-master, in an enquiry as to charges against the latter, were privileged; *Wells v. Lindop*, 13 Ont. Rep. 434, holding a statement to the party's wife, and her companion that the company did not owe her husband anything because of the things he stole, made when she went to collect his wages, was privileged.

— **Relations of speaker and auditor.**

Cited in *Knowles v. Peck*, 42 Conn. 386, 19 Am. Rep. 542, holding that a person engaged to procure information for use in an action for the infringement of a patent occupied such a position, that reports made by him were privileged; *Badger v. New Orleans* (State ex rel. *Badger v. New Orleans*) 49 La. Ann. 804, 37 L.R.A. 540, 21 So. 870, holding that legal and moral duty due by parent to his daughter, gives rise to "qualified privilege" on occasions he thinks, his advice and admonition are required; *Atwill v. Macintosh*, 120 Mass. 177, holding that a person engaged by the parents to make enquiries as to the character of a friend of their daughter occupied such a position that any communication in that regard was privileged; *Garn v. Lockard*, 108 Mich. 196, 65 N. W. 764, holding a

communication made to a public officer, relative to matters within the scope of his duties is privileged in the absence of malice; *Cameron v. Cockran*, 2 Marv. (Del.) 166, 42 Atl. 454; *Abraham v. Baldwin*, 52 Fla. 151, 10 L.R.A. (N.S.) 1051, 42 So. 591, 10 Ann. Cas. 1148; *Bacon v. Michigan C. R. Co.* 66 Mich. 166, 33 N. W. 181; *Marks v. Baker*, 28 Minn. 162, 9 N. W. 678; *Moore v. Butler*, 48 N. H. 161; *Byam v. Collins*, 111 N. Y. 143, 2 L.R.A. 129, 7 Am. St. Rep. 726, 19 N. E. 75 (reversing 39 Hun, 204); *Echard v. Morton*, 26 Pa. Super. Ct. 579,—holding a statement made in good faith relating to a subject in which the person making the communication is interested or in regard to which he has a social or moral duty, made to one having a like interest or duty, is privileged; *Brown v. McCurdy*, 21 N. S. 201, holding that where the defendant in explaining to the artist, why he removed a picture of the plaintiff on exhibition there, said that he was informed that she was a prostitute and the like, the communication was privileged; *Howarth v. Kilgour*, 19 Ont. Rep. 640, holding that the showing of a letter respecting the business of the insolvent debtor by one inspector to another was upon a privileged occasion and no action would lie; *Wells v. Lindop*, 13 Ont. Rep. 434, holding that words used in good faith between parties having common interest in relation to such interests are privileged.

—In presence of, or coming to knowledge of, third person.

Referred to as leading case in *Puterbaugh v. Gold Medal Furniture Mfg. Co.* 7 Ont. L. Rep. 582, holding that by dictating a letter to a stenographer for copying, the privilege was lost, though if made to the person to whom letter was intended, it was privileged.

Cited in *Redgate v. Roush*, 61 Kan. 480, 48 L.R.A. 236, 59 Pac. 1050, holding that the fact that a communication regarding a deposed parson, which is privileged, comes to others than members of the congregation does not affect its privileged character; *Billings v. Fairbanks*, 136 Mass. 177, holding that an accusation of theft made by employer against the employee in the presence of a friend who has come to advise the employee, is made on a privileged occasion; *Brown v. Hathaway*, 13 Allen, 239, holding that the privilege is not lost by the mere fact that the communication was made in the presence of uninterested third parties; *Fahr v. Hayes*, 50 N. J. L. 275, 13 Atl. 261, holding that the fact that the communication was made in the presence of some third person, who was casually present, does not destroy the privilege; *Moran v. Oregon*, 38 N. B. 189, holding that where the party dictated a letter containing defamatory matter to his stenographer the occasion was not privileged; *Holliday v. Ontario Farmers' Mut. Ins. Co.* 1 Ont. App. Rep. 483, on the loss of privilege by speaking them in the presence of third parties; *Waterbury v. Dewe*, 19 N. B. 225 (dissenting opinion), on the effect of speaking privileged communications in the presence of third parties; *Gildner v. Busse*, 3 Ont. L. Rep. 561, holding an accusation in the presence of fellow servants and bystanders, by a master that a servant has committed a theft, is *prima facie* privileged.

—Accusations of crime.

Cited in *Christman v. Christman*, 36 Ill. App. 567, holding that in action for slander in charging plaintiff with commission of crime, it is for court to say whether communication is privileged; *Brow v. Hathaway*, 13 Allen, 239, holding an accusation of theft made after investigation is privileged if made in good faith and without malice; *Livingston v. Bradford*, 115 Mich. 140, 73 N. W. 135, holding an accusation made against a janitor of a bank, in the presence of the assistant bookkeeper, by the bookkeeper, was a privileged communication; *Klinek v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360, holding that person who has had

cause to believe that he was defrauded, signs paper to effect that he had been robbed and swindled by plaintiff and others, and agrees to share expense of prosecution is privileged; *Gorst v. Barr*, 13 Ont. Rep. 644, holding a statement to the plaintiff's father, that she must have stolen money which had been missed, was privileged; *Hanes v. Burnham*, 26 Ont. Rep. 528, holding a statement that the postmaster's wife had taken money from the mails, made by a post office inspector to the postmaster and his sureties was privileged but not when made to a partner of one of the sureties; *Smith v. Armstrong*, 26 U. C. Q. B. 57, holding a warning to a partner by a Government detective, that the other partner was one of a gang of thieves, was a privileged communication; *Tench v. Great Western R. Co.* 33 U. C. Q. B. 8 (reversing 32 U. C. Q. B. 452), holding that where a conductor was discharged for alleged dishonesty and this was printed on placards and posted as warnings to other trainmen, the communication was privileged.

— Scope of privilege.

Cited in *Jones v. Thomas*, 53 L. T. N. S. 678, 34 Week. Rep. 104, 50 J. P. 149, on the extent of the privilege extended.

— Rebuttal of presumption of malice where communication is privileged.

Cited in *Barrows v. Carpenter*, 1 Cliff, 204, Fed. Cas. No. 1,058, holding that proof of privilege goes to negative the inference of malice; *Peace v. Brower*, 72 Ga. 243, on the rebuttal of the presumption of malice by showing the communication was privileged; *Garrett v. Dickerson*, 19 Md. 418, holding that the effect of privilege is to rebut the legal inference or presumption of malice; *Atkinson v. Detroit Free Press Co.* 46 Mich. 341, 9 N. W. 501 (dissenting opinion), on the rebuttal of the presumption of malice in publishing a libel by showing it was privileged; *Holliday v. Ontario Farmers' Mut. Ins. Co.* 1 Ont. App. Rep. 483; *Tench v. Great Western R. Co.* 33 U. C. Q. B. 8 (dissenting opinion).— on occasion as preventing inference of malice which law draws from unlawful publications.

Malice as question for jury.

Cited in *Swan v. Tappan*, 5 Cush. 104, holding that in action for publishing disparaging statements concerning goods of plaintiff, if there was reasonable occasion therefor, plaintiff cannot recover unless he can show malice in fact, which is for jury.

9 E. R. C. 67, *HEMMINGS v. GASSON*, 4 Jur. N. S. 834, El. Bl. & El. 346, 27 L. J. Q. B. N. S. 252, 6 Week. Rep. 601.

Pleading innuendo and colloquium in action for slander.

Cited in *Allen v. Oppenheimer*, 166 Fed. 826, holding that under the statute of New Jersey a plaintiff can plead the words complained of, and put on them by innuendo or specified defamatory sense, any construction he may see fit, without showing by colloquium, that they contain a defamatory charge; *Hand v. Winton*, 38 N. J. L. 122, holding that the pleader can set out the mere words complained of and put any construction upon them by innuendo.

Time for reflection as proof of malice in slander.

Cited in *Hamel v. Angot*, 14 Quebec L. R. 56, holding that the court will consider the length of time existing between the two accusations in determining whether malice existed when the latter was made.

Cited in notes in 42 L.R.A.(N.S.) 1110, or repetition of privileged statement as evidence of malice: 11 Eng. Rul. Cas. 241, on admissibility of fact collateral to issue.

Meaning of words spoken question for jury.

Cited in *Harris v. Clayton*, 21 N. B. 237; *Crosskill v. Morning Herald Printing & Pub. Co.* 16 N. S. 200; *Bowers v. Hutchinson*, 5 N. S. 679; *Ray v. Corbett*, 16 N. S. 407; *Fitch v. Lemmon*, 27 U. C. Q. B. 273; *Black v. Alcock*, 12 U. C. C. P. 19,—to the point that it is for jury to say whether words were spoken with meaning alleged by plaintiff.

Necessity of plaintiff showing that apparently harmless words were used in libellous sense.

Cited in *Newbold v. J. M. Bradstreet & Son*, 57 Md. 38, 40 Am. Rep. 426, holding that if words be susceptible of harmless meaning it is incumbent upon plaintiff to show, that they were used in libellous sense.

9 E. R. C. 87, *ZENOBIUS v. AXTELL*, 3 Revised Rep. 142, 6 T. R. 162.

Pleading libel published in foreign language.

Cited in *Hickley v. Grosjean*, 6 Blackf. 351, holding that it is necessary to aver what the party understood to be the meaning of the words uttered in a foreign language.

—Necessity of pleading in language in which published.

Referred to as a leading case in *Zeig v. Ort*, 3 Pinney (Wis.) 30, 3 Chand. (Wis.) 26, holding that slanderous words must be set out in the language in which they were uttered, with an English translation of their import, otherwise the variance will be fatal.

Cited in *Romano v. De Vito*, 191 Mass. 457, 78 N. E. 105, 6 Ann. Cas. 731, holding that the language alleged as libellous must be set out in the language in which it was published and followed by an English translation, which must be proven correct; *State v. Marlier*, 46 Mo. App. 233, holding that an indictment for criminal libel, the words if uttered in a foreign tongue, should be set forth in that language, and followed by a translation, or the indictment is bad; *Bower v. Deideker*, 38 Iowa, 418; *People v. Robertson*, 3 Wheeler C. C. 180,—on the necessity of pleading libellous matter in the language in which it was uttered.

Necessity of translation of document in foreign language introduced in evidence.

Cited in *Frank v. Carson*, 15 U. C. C. P. 135, on necessity of translation of document in foreign language when introduced in evidence.

Necessity of pleading alleged libellous matter, verbatim.

Cited in *Whitaker v. Lorents*, Fed. Cas. No. 17,527a, 12 N. C. 271; *Kenyon v. Cameron*, 17 R. I. 122, 20 Atl. 233; *State v. Brownlow*, 7 Humph. 63,—holding that libellous matter must be pleaded verbatim; *Stephens v. State*, Wright (Ohio) 73, on the necessity of pleading in full the language alleged to be libellous; *McMillen v. State*, 5 Ohio, 269, on the necessity of setting out in full in an indictment the instrument alleged to have been counterfeited; *Cook v. Cox*, 3 Maule & S. 110, 15 Revised Rep. 432, 9 E. R. C. 89, holding a pleading bad which alleged the slanderous words as in substance and effect; *Bradlaugh v. R. L. R.* 3 Q. B. Div. 607, 38 L. T. N. S. 118, 26 Week. Rep. 410, 14 Cox. C. C. 68, holding that an indictment for publishing obscene libel must set out the words charged as obscene, or the indictment is bad.

9 E. R. C. 89, *COOK v. COX*, 3 Maule & S. 110, 15 Revised Rep. 432.

Pleading in action for slander or libel.

Cited in *Edgerly v. Swain*, 32 N. H. 478, on the proper pleading in action for slander or libel.

— **Necessity of pleading exact words charged as slanderous.**

Cited in *State v. Marlier*, 46 Mo. App. 233, holding that words alleged to be slanderous should be charged as spoken and in tongue spoken; and if in foreign language be followed by proper translation; *Forsyth v. Edmiston*, 2 Abb. Pr. 430, 5 Duer, 653, holding that an allegation of slanderous words in substance and effect, is bad on demurrer; *Fox v. Vanderbeck*, 5 Cow. 513, holding that the words by which the slander is conveyed must be stated in the declaration, and substantially proved; *Webster v. Holmes*, 62 N. J. L. 55, 40 Atl. 778; *Germ Proof Filter Co. v. Pasteur Chamberland Filter Co.* 81 Hun, 49, 30 N. Y. Supp. 584; *Kenyon v. Cameron*, 17 R. I. 122, 20 Atl. 233; *Hansbrough v. Stinnett*, 25 Gratt. 495; *Zeig v. Ort*, 3 Pinney (Wis.) 30, 3 Chand. (Wis.) 26; *Whitaker v. Freeman*, Fed. Cas. No. 17,527a, 12 N. C. (1 Dev. L.) 271,—holding that a complaint in an action for slander or libel must set out the slanderous words verbatim, and not their substance or effect; *Trianovski v. Kleinschmidt*, 19 Phila. 445, 4 Pa. Co. Ct. 298, 44 Leg. Int. 430, holding that in an action for slander the plaintiff must expressly allege the words complained of as spoken by the defendant; *Phillips v. Odell*, 5 U. C. Q. B. O. S. 483, holding that pleading a narration of the effect of the slanderous words was not sufficient; *Ferguson v. Gilmour*, 4 Lower Can. Rep. 57, on the necessity of pleading the exact words charged as libellous; *Bradlaugh v. R. L. R.* 3 Q. B. Div. 607, 38 L. T. N. S. 118, 26 Week. Rep. 410, 14 Cox C. C. 68, holding an indictment for publishing obscene libel, bad which did not set out the words charged as obscene.

Disapproved in *Whiting v. Smith*, 13 Pick. 364, holding that a declaration in an action for slander, may set out the words themselves or the substance of them.

Sufficiency of pleadings containing allegations in the alternative.

Cited in *Porter v. Hermann*, 8 Cal. 619, holding a pleading insufficient which alleges in the alternative a party's capacity as agent or attorney in fact; *Boyce v. Brown*, 7 Barb. 80, holding that pleadings should not be in the alternative; *Van Rensselaer v. Bradley*, 3 Denio, 135, 45 Am. Dec. 451, on the sufficiency of a pleading containing alternative allegations; *Boylard v. New York*, 1 Sandf. 27, holding that averments in the alternative are bad on demurrer.

Recovery in one action as bar to a subsequent one.

Cited in *True v. Plimley*, 36 Me. 466, on the pleading of the recovery in one action as a bar to a subsequent action for the same cause.

Arrest of judgment after general verdict upon some bad counts.

Cited in *Bank of United States v. Moss*, 6 How. 31, 12 L. ed. 331, on the arrest of judgment where there is a general verdict on two or more counts, where some are bad; *West v. Ratledge*, 15 N. C. (4 Dev. L.) 31, holding that general verdict upon declaration containing defective count, will not entitle plaintiff to verdict; *Dewey v. Fifield*, 2 Wis. 73, holding that general verdict upon declaration containing one defective count, will not authorize judgment unless it can be shown that testimony related to good counts only.

9 E. R. C. 98, *J'ANSON v. STUART*, 1 Revised Rep. 392, 1 T. R. 748.

Sufficiency of general allegations.

Cited in *Hazard v. Griswold*, 21 Fed. 178, holding that a mere allegation of fraud in general terms without stating the facts upon which they rest is insufficient; *State v. Peck*, 58 Me. 123; *Matthews v. Bailey*, 25 Miss. 33; *Morris Canal*

& Bkg. Co. *v.* Van Vorst, 23 N. J. L. 98, holding that when a subject comprehends a multiplicity of matter, the law allows of general pleading; *Couch v. Meeker*, 2 Conn. 302, 7 Am. Dec. 274, on the sufficiency of a general plea of performance of a contract; *Weed v. Hill*, 2 Miles (Pa.) 122, holding that generality in pleading is allowable, but not to an extent which omits matters necessary to constitute a defense, or permits a number of specific acts to be stated in mass in one allegation; *Wright v. Wright*, 3 Tex. 168, on the sufficiency of general allegations in pleadings; *People v. Manhattan Co.* 9 Wend. 351, holding that an allegation in general terms as to the breach of contract without stating the facts constituting the breach, did not form an issue; *Ratcliffe v. Evans* [1892] 2 Q. B. 524, 61 L. J. Q. B. N. S. 535, 66 L. T. N. S. 794, 40 Week. Rep. 578, 56 J. P. 837, on the sufficiency of general allegations in pleadings as depending on the general subject matter.

Distinguished in *Mason v. Evans*, 1 N. J. L. 182, holding that a plea that a bond was obtained by fraud generally, is a good plea.

—In indictments.

Cited in *Com. v. Wood*, 4 Gray, 11, holding that an indictment which avers generally, that the defendant at a time and place specified, was a common seller of intoxicating liquors, was sufficient; *Covv v. State*, 4 Port. (Ala.) 186; *Graham v. State*, 1 Ark. 171; *Com. v. Moore*, 2 Dana, 402; *Kern v. State*, 7 Ohio St. 411,—on the requisites of certainty in indictments; *Com. v. Maize*, 7 Legal Gaz. 199, 3 Legal Chron. 29, 3 Foster (Pa.) 37, 4 Luzerne Leg. Reg. 171, on the certainty requisite in bill of particulars of indictment.

—In actions for slander and libel.

Cited in *Bathrick v. Detroit Post & Tribune Co.* 50 Mich. 629, 45 Am. Rep. 63, 16 N. W. 172, on the pleadings in an action for libel; *Gibbs v. Shaw*, 18 U. C. Q. B. 165, holding a plea to a declaration for libel was bad as too general in not stating the facts on which the defendant based his opinions as set forth in the libel.

—Pleas of justification.

Cited in *Barrows v. Carpenter*, 1 Cliff. 204, Fed. Cas. No. 1,058, holding that the plea of justification must state some specific instances of the misconduct imputed the plaintiff; *Jones v. Cecil*, 10 Ark. 592, holding that in a plea justifying for a libel the particular facts should be set out; *Donahoe v. Star Pub. Co.* 3 Penn. (Del.) 545, 53 Atl. 1028, on the framing of a plea of justification of the truth; *Cooper v. Greeley*, 1 Denio, 347, on the sufficiency of a plea of justification which is general and not specific; *Van Ness v. Hamilton*, 19 Johns. 349; *Fry v. Bennett*, 5 Sandf. 54, 1 N. Y. Code Rep. N. S. 238,—holding that the facts relied upon to prove a justification must be alleged, and not the mere truth of the alleged slander; *Torrey v. Field*, 10 Vt. 353, holding that if a person attempt to justify the libel he must plead not only the truth of it, but the particular facts showing the libel to be true; *R. v. Creighton*, 19 Ont. Rep. 339, holding that the plea to an indictment for libel, which did not set out the facts upon which the defendant intended to rely to prove justification was bad; *Laird v. Leader Pub. Co.* 2 Sask. L. R. 1, holding that it is not now necessary to put particulars relied on by way of justification in pleading, but such particulars if not pleaded, must be subsequently delivered; *Zierenberg v. Labouchere* [1893] 2 Q. B. 183, 63 L. J. Q. B. N. S. 89, 4 Reports, 464, 69 L. T. N. S. 172, 41 Week. Rep. 675, 57 J. P. 71, 9 Eng. Rul. Cas. 105, holding that a defendant who pleads

a justification in an action for libel must state in his particulars the facts on which he relies in support of his justification.

Cited in note in 21 L.R.A. 508, on truth as defense to libel or slander.

Issue of general character of the plaintiff in slander or libel.

Cited in *Sayre v. Sayre*, 25 N. J. L. 235, on the general character of the plaintiff in an action for slander, as being in issue only so far as made so by a special plea of justification; *Foot v. Tracy*, 1 Johns. 46, on the putting in issue under general issue, the general character of the plaintiff; *Burford v. McLuny*, 1 Mott. & McC. 268 (dissenting opinion), on the general allegations in the pleadings as putting the character of the plaintiff in issue.

Cited in note in 41 L. ed. U. S. 469, on evidence of good character of one accused of crime.

Distinguished in *Bowen v. Hall*, 20 Vt. 232, holding that under general issue, the general character of the plaintiff may be shown in mitigation of damages, but not particular instances of bad conduct.

Sufficiency of proof of justification.

Cited in *State v. Hoskins*, 109 Iowa, 656, 47 L.R.A. 223, 77 Am. St. Rep. 560, 80 N. W. 1063, on the truth of the charge being proved as showing justification or in mitigation of damages; *Burford v. Wible*, 32 Pa. 95, on the necessity of the proof of the justification being as broad as the facts charged in pleading.

Words importing a slanderous charge.

Cited in *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308, holding that words charging unmarried woman with fornication are not in themselves actionable; *Fowle v. Robbins*, 12 Mass. 498, on what words are actionable as importing a slanderous charge.

Libelousness of charge of swindling.

Cited in *Forrest v. Hanson*, 1 Cranch, C. C. 63, Fed. Cas. No. 4,943, holding that it is actionable to say of a director of a bank that he is a swindler; *Lindley v. Horton*, 27 Conn. 58, on the words charging swindling as being libellous though not ordinarily being actionable; *Klinek v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360, holding that paper denominating plaintiff as robber and swindler, is prima facie a libel; *Brown v. Beatty*, 12 U. C. C. P. 107, on the meaning of the word swindler as used in a libellous charge.

Indictment for keeping disorderly house or one of ill-fame.

Cited in *Heard v. State*, 113 Ga. 444, 39 S. E. 118, on the elements of the offense; *Lord v. State*, 16 N. H. 331, 41 Am. Dec. 729, holding that indictment lies for keeping gaming house; *State v. Prescott*, 33 N. H. 212, on the sufficiency of keeping a disorderly house; *State v. Dame*, 60 N. H. 479, 49 Am. Rep. 331, holding that in an indictment for keeping a disorderly house, it is not necessary to allege or prove the character of the persons who frequent the same; *R. v. McNamara*, 20 Ont. Rep. 489, on the sufficiency of an indictment charging the keeping of a bawdy house.

— Proof of same.

Cited in *Com. v. Kimball*, 7 Gray, 328, holding that the character of the women frequenting a house and the character of their conversation while there, are competent evidence; *State v. McGregor*, 41 N. H. 407, on the proper evidence to prove charge of keeping a bawdy house; *R. v. St. Clair*, 27 Ont. App. Rep. 308, on the nature of the evidence to prove charge.

Indictment for barratry.

Cited in *United States v. Porter*, 2 Cranch, C. C. 60, Fed. Cas. No. 16,072, on

the sufficiency of notice of particular acts in prosecution for barratry; *Com. v. Davis*, 11 Pick. 432, on the sufficiency of an indictment for barratry.

9 E. R. C. 105, *ZIERENBERG v. LABOUCHERE*, 57 J. P. 711, 63 L. J. Q. B. N. S. 89, 69 L. T. N. S. 172 [1893] 2 Q. B. 183, 1 Reports, 464, 41 Week. Rep. 675.

When particulars must precede discovery in action for libel.

Cited in *Timmons v. National Life Assur. Co.* 18 Manitoba L. Rep. 465, holding that defendant must deliver particulars of grounds of belief that words complained of as libel were true; *Bullen v. Templeman*, 5 B. C. 43, holding that a defendant in an action for libel must furnish the plaintiff with the particular facts relied on as a justification before he can obtain discovery from the plaintiff; *Beaton v. Globe Printing Co.* 16 Ont. Pr. 281 (reversing 15 Ont. Pr. Rep. 473), holding that it is not proper to order a discovery before pleading, so as to enable the parties to ascertain whether they have a defense, except in exceptional cases, necessary for the furtherance of justice; *Yorkshire Provident Life Assur. Co. v. Gilbert* [1895] 2 Q. B. 148, 64 L. J. Q. B. N. S. 578, 14 Reports, 411, 72 L. T. N. S. 445, holding that where a party justified in a suit for slander and delivers particulars in support of his plea, the issues are confined to those particulars, and the defendant can only obtain a discovery of documents relating to those matters.

Distinguished in *Beaton v. Globe Printing Co.* 15 Ont. Pr. Rep. 473, holding that plaintiff may be required to submit to examination before delivery of statement of defense in libel action; *Waynes Merthyr Co. v. Radford* [1896] 1 Ch. 29, 65 L. J. Ch. N. S. 140, 73 L. T. N. S. 624, 44 Week. Rep. 103, holding there is no fixed rule as to when particulars must precede discovery.

Necessity of delivering particulars relied on by way of justification.

Cited in *Gnichon v. Fishermen's Cannery Co.* 4 B. C. 516, holding that mere fact that particulars of justification will necessarily disclose names of witnesses is no objection if party is otherwise entitled to them; *Laird v. Leader Pub. Co.* 2 Sask. L. R. 1, holding that it is not now necessary to put particulars relied on by way of justification in pleadings, but such particulars, if not pleaded, must be subsequently delivered if ordered.

9 E. R. C. 117, *BLAGG v. STURT*, 10 Q. B. 906, affirming the decision of the Court of Queen's Bench, reported in 11 Jur. 1011, 16 L. J. Q. B. N. S. 39, 10 Q. B. 899.

Questions for court and jury relative to the meaning of words ascribed by innuendo.

Cited in *Richardson v. Thorpe*, 73 N. H. 532, 63 Atl. 580; *Commercial Pub. Co. v. Smith*, 79 C. C. A. 410, 149 Fed. 704,—holding that it is for jury to say whether language was used in sense ascribed by innuendo only after court has determined that language will bear such meaning; *Powers v. Cary*, 64 Me. 9, holding that whether the true meaning of the slanderous words was that ascribed to it by the innuendo was a question for the jury; *Anonymous*, 29 U. C. Q. B. 456, holding that it is for the court to say whether the words are capable of the meaning assigned to it by the innuendo; *Capital & Counties Bank v. Henty*, L. R. 5 C. P. Div. 514, 49 L. J. C. P. N. S. 830, 43 L. T. N. S. 651, 28 Week. Rep. 851, 45 J. P. 188, L. R. 7 App. Cas. 741, 52 L. J. Q. B. N. S. 232, 47 L. T. N. S. 662, 31 Week. Rep. 157, 47 J. P. 214, holding that it is the duty of the court to decide that the words are capable of the meaning ascribed to them by the

innuendo, under all the circumstances, and then to leave to the jury the question whether such meaning has been ascribed to them; *Nevill v. Fine Arts & General Ins. Co.* [1895] 2 Q. B. 156, 64 L. J. Q. B. N. S. 681, 14 Reports, 587, 72 L. T. N. S. 525, 59 J. P. 371, on the duties of the court and juries relative to the meaning to be ascribed to the alleged slanderous words, by innuendo.

The decision of the court of Queen's Bench was cited in *Hays v. Mather*, 15 Ill. App. 30; *Bowers v. Hutchinson*, 5 N. S. 679; *Ray v. Corbett*, 16 N. S. 407; *Memphis Teleph. Co. v. Cumberland Teleph. & Teleg. Co.* 76 C. C. A. 436, 145 Fed. 904,—holding that it is for jury to say whether language was used in sense ascribed by innuendo, only after court has determined that language will bear such meaning; *Campbell v. Campbell*, 54 Wis. 90, 11 N. W. 456, on the duty of the court in determining the capacity of the words to take the meaning ascribed to them by the innuendo; *Bradley v. Cramer*, 59 Wis. 309, 48 Am. Rep. 511, 18 N. W. 268, holding that it is for the court to decide whether a publication is capable of the meaning ascribed to it by an innuendo, and for the jury to decide if that meaning is truly ascribed to; *Hunt v. Goodlake*, 43 L. J. C. P. N. S. 54, 29 L. T. N. S. 472, holding that it is the duty of the court to decide whether the words are capable of the meaning attached to it by the innuendo, taking into consideration all the circumstances.

Necessity of proof of innuendo.

The decision of the court of Queen's Bench was cited in *Gates v. Lohnes*, 31 N. S. 221, holding that it was not necessary to give evidence to prove innuendo, where, in action for slander, meaning of words were perfectly obvious.

Falsity of charges as evidence of malice.

Cited in *Miller v. Green*, 33 N. S. 517, on what constitutes malice in cases of libel or slander.

The decision of the court of Queen's Bench was cited in *Laing v. Nelson*, 40 Neb. 252, 58 N. W. 846, holding that evidence of the falsity of the charges are competent, but not alone sufficient, to prove malice.

Malice in making charges as question for the jury.

The decision of the court of Queen's Bench was cited in *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 605, holding the question of good faith in making a privileged communication was for the jury; *Moore v. Butler*, 48 N. H. 161, holding same as to malice.

Pleading innuendo.

The decision of the court of Queen's Bench was cited in *Uler v. Chicago Live Stock Exch.* 54 Ill. App. 233, on the office of the innuendo in pleadings in slander and libel.

Privileged communications to public officers.

Cited in notes in 27 L.R.A.(N.S.) 1044, on privileged character of complaints to public officer against subordinate; 25 L.R.A.(N.S.) 457, on privilege attaching to proceedings for impeachment or removal of public officers; 4 L.R.A.(N.S.) 1112, on liability from giving or refusing information affecting servant's character or reputation.

The decision of the court of Queen's Bench was cited in *Logan v. Hodges*, 146 N. C. 38, 59 S. E. 349, 14 Ann. Cas. 103, holding that postal card containing libellous communications concerning public official or county, though written in public interest, is not privileged when not addressed to person having jurisdiction to entertain complaint; *Kerr v. Davison*, 9 N. S. 354, holding that a letter addressed to Provincial Secretary of the Province complaining of the conduct

of a surveyor of land in a certain county was privileged; *Harrison v. Bush*, 5 El. & Bl. 344, 25 L. J. Q. B. N. S. 25, 1 Jur. N. S. 846, 3 Week. Rep. 474, on a memorial to the Secretary of State charging a petty official with misconduct in office as a privileged communication.

9 E. R. C. 130, *THORLEY'S CATTLE FOOD CO. v. MASSAM*, L. R. 14 Ch. Div. 763, 42 L. T. N. S. 851, 28 Week. Rep. 966, affirming the decision of the Vice Chancellor, reported in 41 L. T. N. S. 543.

Jurisdiction of a court to enjoin the publication of a libel or slander.

Cited in *Emaek v. Kane*, 34 Fed. 46; *Manhattan Iron Works v. French*, 12 Abb. N. C. 446; *Greene v. United States Dealers' Protective Asso. & M. Agency*, 39 Hun, 300, 16 Abb. N. C. 419,—on the right to restrain the publication of a libel; *Thomas v. Williams*, L. R. 14 Ch. Div. 864, 49 L. J. Ch. N. S. 605, 43 L. T. N. S. 91, 28 Week. Rep. 983, holding that a court has jurisdiction to restrain by injunction the publication of a libel injurious to trade, without proof of special damages; *Quartz Hill Consol. Gold Min. Co. v. Beall*, L. R. 20 Ch. Div. 501, 51 L. J. Ch. N. S. 874, 46 L. T. N. S. 746, 30 Week. Rep. 583, on the right to restrain the publication of a libel, where the same may be a privileged communication; *Hermann Loog v. Bean*, L. R. 26 Ch. Div. 306, 53 L. J. Ch. N. S. 1128, 51 L. T. N. S. 442, 32 Week. Rep. 994, 48 J. P. 708, holding that a court could restrain a person from making slanderous statements calculated to injure another in his business whether these are oral or written.

Distinguished in *Kidd v. Horry*, 28 Fed. 773, 18 W. N. C. 287, holding that a court has not the power to restrain the repetition of a libel, for which a suit is pending; *Balliet v. Cassidy*, 104 Fed. 704; *Allegretti Chocolate Cream Co. v. Rubel*, 83 Ill. App. 558,—holding that a court would not enjoin the publication of a libel.

Libel on trade or business.

Cited in *South Hetton Coal Co. v. North Eastern News Asso.* 9 Reports, 240, 69 L. T. N. S. 844, 42 Week. Rep. 322, 58 J. P. 196, [1894] 1 Q. B. 133, 63 L. J. Q. B. N. S. 293, holding that an action of libel will lie at the suit of an incorporated trading company in respect of a libel calculated to injure its reputation in the way of its business, without proof of special damages.

Injunction against acts calculated to injure another in his business.

Cited in *William Rogers Mfg. Co. v. Rogers & S. Mfg. Co.* 11 Fed. 495, holding that one may be restrained from use of his own name in business, if he uses it in such way as to appropriate good will of business already established by others of that name; *Williams v. Brooks*, 50 Conn. 278, 47 Am. Rep. 642, holding that injunction should be granted to restrain use of name by which brand of hair-pins became known, where similar packages were used for distributing them, although no intention to deceive was proved; *Frazer v. Frazer Lubricator Co.* 18 Ill. App. 450, holding that breach of stipulation not to manufacture candy under certain established name may be restrained; *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307, on the restraining of acts calculated to injure person in his business; *Robinson v. Storm*, 103 Tenn. 40, 52 S. W. 880, holding that person may not use his name in such manner as to defraud another; *Dicks v. Brooks*, L. R. 15 Ch. Div. 22, 49 L. J. Ch. N. S. 12, 43 L. T. N. S. 71, 29 Week. Rep. 87, on the right to maintain an action for damages for the publication of a circular which was alleged untrue, and calculated to injure another in his business; *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119,

17 Eng. Rul. Cas. 285, on the enjoining of acts calculated to hurt another in his business.

Cited in note in 16 L.R.A. 243, on injunction against false statements as to plaintiff's property or business.

Distinguished in *Halsey v. Brotherhood*, L. R. 19 Ch. Div. 386, 51 L. J. Ch. N. S. 233, 45 L. T. N. S. 649, 30 Week. Rep. 279, holding that a court would not restrain the publication of a circular warning people that a certain article is an infringement of a patent, until it is proved that the circular is untrue.

Nominal damages as carrying costs.

Cited in *Wills v. Carman*, 14 Ont. App. Rep. 656, on the granting of nominal damages so as to carry costs.

9 E. R. C. 150. *WHITE v. MELLIN* [1895] A. C. 154, 59 J. P. 629, 64 L. J. Ch. N. S. 308, 72 L. T. N. S. 334, 11 Reports, 141, 43 Week. Rep. 353, reversing the decision of the Court of Appeal, reported in 63 L. J. Ch. N. S. 636, L. R. [1894] 3 Ch. 276.

Proof of damages for trade slander.

Cited in *Nagy v. Manitoba Free Press Co.* 16 Manitoba L. Rep. 619, (dissenting opinion), on the right to recover damages for trade slander without proof of special damages.

Cited in note in 8 Eng. Rul. Cas. 402, on necessity of alleging and proving special damages.

Distinguished in *Chinese Empire Reform Asso. v. Chinese Newspaper Pub. Co.* 13 B. C. 141, on the right of a non-trading corporation to maintain an action for trade slander without proof of special loss.

Actionable disparagement of rival trader's goods.

Cited in *Hubback & Sons v. Wilkinson* [1899] 1 Q. B. 86, 68 L. J. Q. B. N. S. 34, 79 L. T. N. S. 429, 15 Times L. R. 29; *Alcott v. Millar's Karbl & Jarrah Forests* [1905] 91 L. T. N. S. 722, 21 Times L. R. 30,—on what will constitute disparagement of a rival trader's goods so as to be actionable.

Restraining disparaging statements.

Cited in *Hawker v. Stourfield Park Hotel Co.* [1900] W. N. 51, on the right to restrain an untrue statement which causes injury, though not libellous; *Dunlop Pneumatic Tyre Co. v. Maison Talbot*, 20 Times L. R. 579, holding that an injunction would not lie for slander of title where no special damage, past or future, was proven.

Slander of title or trade.

Cited in *Bruce v. Smith* [1898] 1 Sc. Sess. Cas. 5 Ser. [Fraser] 327 on an action for damages for trade slander as a familiar action in England.

Cited in 1 Cooley, Torts, 3d ed. 460, on presumption of malice from slander of title to property.

9 E. R. C. 169. *HARGRAVE v. LE BRETON*, 4 Burr. 2422.

Malice as an essential in libel and slander.

Cited in *Faris v. Starke*, 9 Dana. 128, 33 Am. Dec. 536, holding that malice is essential to constitute slander, though in most cases it will be implied.

—Slander of title.

Cited in *Edwards v. Burris*, 60 Cal. 157, holding that an action for slander of title is only maintainable by one who possesses an estate or interest in the property against one who maliciously and falsely denies the title thereto; *Bailey*

v. Dean, 5 Barb. 297, holding that to maintain an action for slander of title there must be want of probable cause; Like v. McKinstry, 41 Barb. 186, holding that in action for slander of title to personality it must be shown that the words were uttered maliciously and for the purpose of injuring the plaintiff; Cardon v. McConnell, 120 N. C. 461, 27 S. E. 109, holding that an action for slander of title can not be maintained unless the words spoken were known to be false and were maliciously uttered; Gordon v. McGibbon, 16 N. B. 49, on the necessity of express malice existing before a recovery for slander of title.

Pleading damages in action for slander of title.

Cited in Hamilton v. Walters, 4 U. C. Q. B. O. S. 24, holding that declaration, in action for slander of title, may allege general or special damage depending upon facts.

—Presumption of malice.

Cited in Ormsby v. Douglass, 37 N. Y. 477, holding that when it is made to appear that defendant had just occasion for speaking words deemed slander, malice is not to be presumed.

Privileged communications.

* Cited in Campbell v. Brown, 2 Woods, 349, Fed. Cas. No. 2,355, holding that acts done bona fide by an attorney at law in the exercise of his proper functions as such are not liable for their acts.

Cited in note in 4 L.R.A.(N.S.) 1106, on liability growing out of giving or refusing information affecting character or reputation of servant.

—Necessity of existence of express malice to make them actionable.

Cited in Philadelphia & B. R. Co. v. Quigley, 21 How. 202, 16 L. ed. 73, on the necessity of express malice existing in order to make a privileged communication actionable; Cassett v. Gilbert, 6 Gray, 94, holding that in order to make a privileged communication actionable it must be uttered with express malice and with intent to harm; Sewall v. Catlin, 3 Wend. 291, on the burden of proof being upon the plaintiff to show express malice, where the communication was privileged; Richards v. Boulton, 4 U. C. Q. B. O. S. 95, on the necessity of finding of express malice in action for slander where the communication may be privileged.

Loss of customers as special damages.

Cited in Paull v. Halferty, 63 Pa. 46, 3 Am. Rep. 518, holding that where one is prevented from selling land by impertinent interference of another, he may maintain action for inconvenience suffered; Ratcliffe v. Evans [1892] 2 Q. B. 524, 61 L. J. Q. B. N. S. 535, 66 L. T. N. S. 794, 40 Week. Rep. 578, 56 J. P. 837, holding that a general loss of business is sufficient to show special damages where the general loss is distinct from that of well known customers.

Cited in note in 9 Eng. Rul. Cas. 166, on slander of goods of rival trader.

—Pleading.

Cited in Morasse v. Brochu, 151 Mass. 567, 8 L.R.A. 524, 21 Am. St. Rep. 474, 25 N. E. 74, on the general averment of loss of customers as being sufficient to show special damage; Trenton Mut. L. & F. Ins. Co. v. Perrine, 23 N. J. L. 402, 57 Am. Dec. 400, holding that in pleading special damages, it was necessary to name the customers who had been lost by reason of the libel, unless they were so numerous as to make it inconvenient; Knickerbocker L. Ins. Co. v. Ecclesine, 2 Jones & S. 76, on the averment of special damage in action for libel.

Pleading justification.

Cited in *Smith v. Spooner*, 9 E. R. C. 173, 3 Taunt. 246-256, 12 Revised Rep. 645, on proof of justification under general issue.

9 E. R. C. 173, *SMITH v. SPOONER*, 12 Revised Rep. 645, 3 Taunt. 246.

Action for slander of title.

Cited in *Edwards v. Burris*, 60 Cal. 157, holding that an action for slander of title to property is maintainable only by a person having an estate or interest therein, against one who maliciously and falsely denies or impugns his title; *Long v. Rucker*, 166 Mo. App. 572, 149 S. W. 1051, holding that tenant may maintain action against landlord for false and malicious publication of slander against tenancy; if damage has resulted from slander; *Cormier v. Bourque*, 32 N. B. 283, holding that taking a false and spurious deed and fraudulently claiming title thereunder to another's land is not actionable.

—Necessity of existence of malice.

Cited in *Kendall v. Stone*, 2 Sandf. 269, holding that in order to constitute slander of title words spoken must be false; they must work injury to plaintiff; and they must be malicious; *Kendall v. Stone*, 5 N. Y. 14, holding that to maintain action for slander of title to lands, words spoken must not only be false, but they must be uttered maliciously; *Bailey v. Dean*, 5 Barb. 297, holding that to sustain an action for slander of title want of probable cause must be shown; *Dodge v. Colby*, 37 Hun. 515, holding that an action for slander of title to land can not be maintained without an averment of malice; *Steward v. Young*, L. R. 5 C. P. 122, 39 L. J. C. P. N. S. 85, 22 L. T. N. S. 163, 18 Week. Rep. 492, on necessity of affirmative proof of malice in slander of title by unfounded adverse claim.

Malicious privileged communications.

Cited in *Philadelphia & B. R. Co. v. Quigley*, 21 How. 202, 16 L. ed. 73, on the necessity of the existence of express malice to make a privileged communication actionable; *Magy v. Manitoba Free Press Co.* 16 Manitoba L. Rep. 618 (dissenting opinion), on the necessity of the existence of express malice to make privileged communications actionable; *Richards v. Boulton*, 4 U. C. Q. B. O. S. 95, holding that express malice must exist to make a privileged communication actionable.

Validity of lease.

Cited in *Doe ex dem. Somers v. Bullen*, 5 U. C. Q. B. 369 (dissenting opinion), on effect of covenant to pay rent and that upon default lease shall be void.

9 E. R. C. 186, *REX v. GRANT*, 5 Barn. & Ad. 1081, 3 Nev. & M. 106.

Unurged exception as ground for new trial.

Cited in *R. v. Wilkinson*, 42 U. C. Q. B. 492, holding that though the evidence was wrongfully refused, if its rejection was not formally urged, it is not ground for new trial.

Referring to judge's notes on motion for new trial.

Cited in *Chapman v. Bishop*, 1 U. C. C. P. 432, on the reference to the judge's notes in motion to obtain a rule nisi.

Conclusiveness of judge's notes of trial.

Cited in *Copp v. Reed*, 19 N. B. 455, holding that affidavits are not admissible to contradict or supply alleged omissions in judge's notes of trial; *Halifax*

Banking Co. v. Worrall, 16 N. S. 490, 491, holding that judge's minutes were conclusive as to what took place at trial, and could be impeached by affidavit.

Right of judge to learn purpose of evidence.

Cited in Key v. Thomson, 12 N. B. 295, holding that a judge who tries a case ought to be informed of the purpose for which evidence is offered.

9 E. R. C. 196, LANNOY v. WERRY, Abbott, Shipping, 5th ed. 184, 4 Bro. P. C. 630.

9 E. R. C. 198, JAMIESON v. LAURIE, Abbott, Shipping, 5th ed. 184, 6 Bro. P. C. 474, 3 Revised Rep. 725.

Right to recover for demurrage.

Cited in Heckscher v. McCrea, 24 Wend. 304, holding where a person contracts to load a ship to a certain weight and falls short in such weight, the owner may recover in the nature of damages freight for the deficiency; Brown v. Ralston, 4 Rand. (Va.) 504, on liability for demurrage.

Distinguished in Robertson v. Bethune, 3 Johns. 342, holding no action for compensation in the nature of demurrage could be maintained for the detention of the vessel by failure of cargo to be ready where there is no agreement either express or implied for demurrage.

9 E. R. C. 201, BROWN v. JOHNSON, Car. & M. 440, 11 L. J. Exch. N. S. 373, 10 Mees. & W. 331.

Lay days when begin to run.

Cited in Aylward v. Smith, 2 Low. Dec. 192, Fed. Cas. No. 688, holding the lay days do not begin to run until the vessel has arrived at her place of discharge and is ready to be unloaded; Gronstadt v. Witthoff, 15 Fed. 265; Lovitt v. Snowball, 33 N. B. 263 (dissenting opinion); Dahl v. Nelson, L. R. 6 App. Cas. 38, 50 L. J. Ch. N. S. 411, 44 L. T. N. S. 381, 29 Week. Rep. 543, 4 Asp. Mar. L. Cas. 392, 9 Eng. Rul. Cas. 235, affirming L. R. 12 Ch. Div. 568, 41 L. T. N. S. 365, 28 Week. Rep. 57; Tapscott v. Balfour, L. R. 8 C. P. 46, 42 L. J. C. P. N. S. 16, 27 L. T. N. S. 710, 21 Week. Rep. 245, 1 Asp. Mar. L. Cas. 501; Sleeper v. Puig, 10 Ben. 181, Fed. Cas. No. 12,940,—on when lay days begin to run.

— Delay after docking.

Cited in Davies v. McVeagh, L. R. 4 Exch. Div. 265, 48 L. J. Exch. N. S. 686, 41 L. T. N. S. 308, 28 Week. Rep. 123, 4 Asp. Mar. L. 149, holding the running of the lay days commenced from the time the vessel was admitted to the dock although the delay in loading was due to the regulations of the dock authorities.

— Timber cargoes.

Cited in Norden S. S. Co. v. Dempsey, L. R. 1 C. P. Div. 654, 45 L. J. C. P. N. S. 764, 24 Week. Rep. 984, 9 Eng. Rul. Cas. 204, holding it might be shown that by the usage of the port that in case of timber ships the lay days commenced only when the vessel was moored at the quay at which it was to unload.

— Liability for demurrage.

Cited in Thiis v. Byers, L. R. 1 Q. B. Div. 244, 45 L. J. Q. B. N. S. 511, 34 L. T. N. S. 526, 24 Week. Rep. 611, 3 Asp. Mar. L. Cas. 147, 9 Eng. Rul. Cas. 225,

holding a charterer was liable for demurrage where by reason of bad weather he was prevented from unloading during the lay days.

Cited in *Hughes* Adm. 163, on right to demurrage under charter party.

Calculation of "lay days" as to Sunday.

Cited in *Benson v. Atwood*, 13 Md. 20, 71 Am. Dec. 611, holding in computing lay days, Sundays would be excluded where the charter party provided for a certain number of running days exclusive of Sunday; *Brooks v. Minturn*, 1 Cal. 481, on Sundays as calculated as lay days.

Computation of time for demurrage.

Cited in *Branch v. Wilmington & W. R. Co.* 77 N. C. 347, holding a provision for a penalty in case of delay in loading beyond a certain number of days excluded Sundays; *Gibbon v. Michaels' Bay Lumber Co.* 7 Ont. Rep. 746, holding in the computing of demurrage Sunday is to be reckoned as one of the days to be allowed for.

Cited in 2 *Meechem, Sales*, 977, on computation of time for delivery under contract fixing time.

Liability of carrier for delay in discharging cargo.

Cited in *Sleeper v. Puig*, 17 Batchf. 36, Fed. Cas. No. 12,941, holding the risk of delay in discharging cargo was not on the owners of the vessel where it was ready to discharge cargo but by reason of the rules of the port it had to await its turn to unload at the mole; *Midland Nav. Co. v. Dominion Elevator Co.* 6 Ont. L. Rep. 432, holding that where port of discharge named contains several places for discharge, and contract also names time within which vessel is to be discharged, merchant must see to it that discharge is made within time specified.

Cited in 2 *Hutchinson*, Car. 3d ed. 940, on place of ship as affecting right to demurrage.

Time for charterer to load.

Cited in *Midland Nav. Co. v. Dominion Elevator Co.* 34 Can. S. C. 578, (affirming 6 Ont. L. Rep. 432), on when obligation of charterer as to time in which cargo was to be loaded was fulfilled.

"Running days."

Cited in *Nielsen v. Wait*, L. R. 16 Q. B. Div. 68, 55 L. J. Q. B. N. S. 87, 34 Week. Rep. 33, 54 L. T. N. S. 340, 5 Asp. Mar. L. Cas. 553, on the meaning of the phrase "running days."

9 E. R. C. 204. *STEAMSHIP CO. "NORDEN" v. DEMPSEY*, L. R. 1 C. P. Div. 654, 45 L. J. C. P. N. S. 764, 24 Week. Rep. 984.

Lay days, when commence to run.

Cited in *Gronstadt v. Mitthoff*, 15 Fed. 265, on when lay days commence to run.

Construction of words having an exact or technical meaning.

Cited in *Houghton v. Watertown F. Ins. Co.* 131 Mass. 300, holding the word "cuts" having an exact and technical meaning among printers, the jury might presume that such was its meaning when used in a policy of insurance.

Agent's authority to act according to usage or custom.

Cited in *Seeber v. Commercial Nat. Bank*, 77 Fed. 957, on agent as having implied authority to act according to the usage or custom of the place where he is employed.

Usage as affecting place for delivery of cargo.

Cited in *The Port Adelaide*, 38 Fed. 753, holding that vessel is required to make delivery of cargo within such parts of port as have become fixed by established usage, if customary berth can be obtained there within reasonable time.

Admissibility of evidence of usage or custom.

Cited in *Troop v. Union Ins. Co.* 32 N. B. 135, holding evidence of a usage or custom inconsistent with the terms of a policy was inadmissible; *Lovitt v. Snowball*, 33 N. B. 263, (dissenting opinion), on the admissibility of evidence of usage or custom.

Cited in note in 11 E. R. C. 223, on parol evidence to contradict written instrument.

9 E. R. C. 219, *LEER v. YATES*, 12 Revised Rep. 671, 3 Taunt. 387.

Liability for demurrage.

Cited in *Burrill v. Crossman*, 16 C. C. A. 381, 35 U. S. App. 608, 69 Fed. 747, on liability of charterer for demurrage; *Morse v. Pesant*, 3 Abb. App. Dec. 321, holding a consignee of a cargo on its acceptance was liable for demurrage where the vessel is delayed beyond the time allowed for unloading; *Kemp v. M. Dougall*, 23 U. C. Q. B. 380; *Falkenburg v. Clark*, 11 R. L. 278,—on when consignee of cargo is liable for demurrage; *Job v. Boe*, Newfoundland Rep. 405, (1897-1903), holding the owner of a vessel had a lien on the cargo as against the charterer where there was a delay on the part of the charterer in loading.

Cited in note in 41 L. ed. U. S. 938, on demurrage.

— Delay not attributable to charterer or particular consignee.

Cited in *Tweedie Trading Co. v. New York C. & H. R. R. Co.* 194 Fed. 281, holding that shipper was not chargeable with demurrage, under contract to receive cargo "as fast as steamer can unload" where cargo of other shippers was on top of defendant's and had to be first unloaded, if he was at all times ready to receive cargo; *McLeod v. 1,600 Tons of Nitrate of Soda*, 55 Fed. 528, holding charterers were not relieved from liability for demurrage where the delay due to a civil war, the port being blockaded by the de facto government; *Rupp v. Lobach*, 4 E. D. Smith, 69, holding a charterer of a vessel is liable for demurrage although the delay was caused by the laws of a county forbidding an entry at the place of lading; *Straker v. Kidd*, L. R. 3 Q. B. Div. 223, 47 L. J. Q. B. N. S. 365, 26 Week. Rep. 511, 4 Asp. Mar. L. Cas. 34 note; *Porteus v. Watney*, L. R. 3 Q. B. Div. 534, 47 L. J. Q. B. N. S. 643, 39 L. T. N. S. 195, 27 Week. Rep. 30, 4 Asp. Mar. L. Cas. 34, 9 Eng. Rul. Cas. 269,—holding a consignee liable for demurrage although the delay in unloading was caused by the delay of other consignees whose goods were stored on top; *Thiis v. Byers*, L. R. 1 Q. B. Div. 244, 45 L. J. Q. B. N. S. 511, 34 L. T. N. S. 526, 24 Week. Rep. 611, 3 Asp. Mar. L. Cas. 147, 9 Eng. Rul. Cas. 225, holding a charterer was not excused from liability for demurrage for a delay in unloading caused by bad weather.

Liability of charterer for breach of contract caused by acts of others.

Cited in *Benson v. Atwood*, 13 Md. 20, 71 Am. Dec. 611, holding the charterer of a vessel to carry a cargo of guano was not excused from liability thereon by reason of the refusal of the government to permit vessel to anchor or take such cargo.

Lay days, when commence to run.

Cited in *Gronstadt v. Witthoff*, 15 Fed. 265, on when lay days commence to run.

9 E. R. C. 225, *THIIS v. BYERS*, 3 Asp. Mar. L. Cas. 147, 45 L. J. Q. B. N. S. 511, 34 L. T. N. S. 526, L. R. 1 Q. B. Div. 244, 24 Week. Rep. 611.

Liability for demurrage for unavoidable delay.

Cited in *McLeod v. 1,600 Tons of Nitrate of Soda*, 55 Fed. 528, holding charterers were not relieved from liability for demurrage where the delay was caused by the blockade of the port of entry by the de facto government during a civil war; *Postlethwaite v. Freeland*, L. R. 5 App. Cas. 599, 49 L. J. Exch. N. S. 630, 42 L. T. N. S. 845, 28 Week. Rep. 833, 4 Asp. Mar. L. Cas. 302, holding same where the delay in unloading was caused by reason of fact that there was an insufficient number of lighters and the vessel had to await her turn; *Straker v. Kidd*, L. R. 3 Q. B. Div. 223, 47 L. J. Q. B. N. S. 365, 26 Week. Rep. 511, 4 Asp. Mar. L. Cas. 34 note; *Porteus v. Watney*, L. R. 3 Q. B. Div. 534, 47 L. J. Q. B. N. S. 643, 39 L. T. N. S. 195, 27 Week. Rep. 30, 9 Eng. Rul. Cas. 269,—holding a consignee was not excused from liability for demurrage where the delay in unloading was caused by the delay of other consignees whose goods were stored above defendants; *Budgett v. Binnington*, L. R. 25 Q. B. Div. 320, 39 Week. Rep. 131, 60 L. J. Q. B. N. S. 1, [1891] 1 Q. B. 35, 6 Asp. Mar. L. Cas. 592, holding same where delay caused by strike of employees of both consignee and owner of vessel; *Manson v. New York, N. H. & H. R. Co.* 55 Conn. 592, on liability of consignee for demurrage; *Nelson v. Dahl*, L. R. 12 Ch. Div. 568, 41 L. T. N. S. 365, affirmed in L. R. 6 App. Cas. 38, 4 Asp. Mar. L. Cas. 392, 50 L. J. Ch. N. S. 411, 44 L. T. N. S. 381, 29 Week. Rep. 543; *Burrill v. Crossman*, 16 C. C. A. 381, 35 U. S. App. 608, 69 Fed. 747,—on the liability of a charterer for demurrage.

Cited in notes in 40 L. ed. 518, on act of God as excuse for nonperformance of obligation; 9 Eng. Rul. Cas. 213, 217, as to when lay days begin to run.

Cited in *Hollingsworth*, Contr. 559, on discharge of contracts by impossibility of performance.

Distinguished in *Empire Transp. Co. v. Philadelphia & R. Coal & I. Co.* 35 L.R.A. 623, 23 C. C. A. 564, 40 U. S. App. 157, 77 Fed. 919, holding a charterer was relieved from liability for demurrage where the delay in unloading was caused by a sudden, unexpected successful strike by charterer's employees; *Castle-gate S. S. Co. v. Dempsey* [1892] 1 Q. B. 54, 61 L. J. Q. B. N. S. 263, 65 L. T. N. S. 755, 40 Week. Rep. 335 (reversed in [1892] 1 Q. B. 854, 61 L. J. Q. B. N. S. 620, 66 L. T. N. S. 742, 40 Week. Rep. 533, 7 Asp. Mar. L. Cas. 186), holding where a cargo was "to be discharged with all despatch as customary" charterer was liable for delay from strikes but not for delay by dockowners who by custom discharged all vessels and were known to be slow.

— Due to weather or natural conditions.

Cited in *Manson v. New York, N. H. & H. R. Co.* 31 Fed. 297, holding the consignee was liable for demurrage where after the vessel had arrived and the master had reported to consignee, the unloading was delayed by ice forming in the ship channel; *Job v. Boe*, Newfoundl. Rep. (1897-1903) 405; *Booye v. A Cargo of Dry Boards*, 42 Fed. 335,—holding a charterer was liable for demurrage where the loading was delayed by the condition of the weather; *Steer v. Phillip*, Newfoundl. Rep. (1884-96) 586, holding same where the roughness of the weather delayed the unloading.

9 E. R. C. 235, DAHL v. NELSON, L. R. 6 App. Cas. 38, 4 Asp. Mar. L. Cas. 392, 50 L. J. Ch. N. S. 411, 44 L. T. N. S. 381, 29 Week. Rep. 543, affirming the decision of the Court of Appeal reported in L. R. 12 Ch. Div. 568, 41 L. T. N. S. 365, 28 Week. Rep. 57.

Liability of charterer for demurrage.

Cited in *Burrill v. Crossman*, 65 Fed. 104; *Burrill v. Crossman*, 16 C. C. A. 381, 35 U. S. App. 608, 69 Fed. 747; *Donnell v. Amoskeag Mfg. Co.* 55 C. C. A. 178, 118 Fed. 10; *Bulman v. Fenwick & Co.* [1894] 1 Q. B. 179, 63 L. J. Q. B. N. S. 123, 9 Reports, 227, 69 L. T. N. S. 651, 42 Week. Rep. 326, 7 Asp. Mar. L. Cas. 388; *Smith v. Harrison*, 50 Fed. 565,—on liability of charterer for demurrage.

—Discharge or loading prevented by crowded docks.

Cited in *Williams v. Theobald*, 8 Sawy. 445, 15 Fed. 465, holding a charterer was liable for demurrage where after the arrival of the vessel at the port of delivery, the unloading was delayed by reason of the crowded condition of the dock; *Murphy v. Coffin*, L. R. 12 Q. B. Div. 87, 32 Week. Rep. 616, holding demurrage was not recoverable where the vessel was ordered to deliver at a certain railroad wharf and on the arrival of the vessel there was a delay because all the berths were filled; *Tharsis Sulphur & Copper Co. v. Morel Bros.* [1891] 2 Q. B. 647, 61 L. J. Q. B. N. S. 11, 65 L. T. N. S. 659, 40 Week. Rep. 58, 7 Asp. Mar. L. Cas. 106, holding same where the berths at the wharf were occupied at time of arrival and the unloading was thus delayed; *Pyman Bros. v. Dreyfus Bros.* L. R. 24 Q. B. Div. 152, 59 L. J. Q. B. N. S. 13, 61 L. T. N. S. 724, 38 Week. Rep. 447, 6 Asp. Mar. L. Cas. 444, holding defendants were liable for demurrage where the vessel arrived in the outer harbor which was as close as she could safely get to the loading berth and the master gave notice that she was ready to load and owing to the crowded condition of the inner harbor there was a delay in loading; *The Carisbrook*, L. R. 15 Prob. Div. 98, 59 L. J. Prob. N. S. 37, 62 L. T. N. S. 843, 38 Week. Rep. 543, 6 Asp. Mar. L. Cas. 507, holding same where after the arrival of the vessel at the port and notice given there was a delay occasioned by reason of all the berths being occupied.

—Delay prior to entry into port or destination.

Cited in *Carsanego v. Wheeler*, 16 Fed. 248, holding a charterer was not liable for demurrage where the delay of the vessel occurred before she found a place where she could make a proper delivery of the cargo; *Allen v. Coltart*, L. R. 11 Q. B. Div. 782, 52 L. J. Q. B. N. S. 626, 48 L. T. N. S. 944, 31 Week. Rep. 841, 5 Asp. Mar. L. Cas. 104, holding demurrage could be recovered where there was not sufficient water to reach the dock to which the ship was ordered to proceed on her arrival at port.

The decision of the Court of Appeal was cited in the *Henry Sutton*, 26 Fed. 923, holding that when accessible dock has been designated, it is duty of vessel to employ tug, or to use such reasonable means as may be necessary to enable her to arrive at place of discharge.

—Sufficiency of arrival at port.

Cited in *Horsley v. Price*, L. R. 11 Q. B. Div. 244, 52 L. J. Q. B. N. S. 603, 49 L. T. N. S. 101, 31 Week. Rep. 786, 5 Asp. Mar. L. Cas. 106, holding there was a sufficient arrival of ship at port to maintain action for demurrage where the vessel arrived at point nearest the port where she was able to float and was there delayed by the state of the tide from proceeding farther; *Carlton S. S. Co. v. Castle Mail Packets Co.* [1897] 2 Q. B. 485, 66 L. J. Q. B. N. S. 819, 77 L. T.

N. S. 332, 46 Week. Rep. 68 (dissenting opinion), on when a ship is an "arrived" ship so as to render charterers liable for a delay in loading.

Construction of charter-party as to excuse for not loading or discharging.

Cited in *Midland Nav. Co. v. Dominion Elevator Co.* 34 Can. S. C. 578 (affirming 6 Ont. L. Rep. 432), holding an owner could not recover damages where on the arrival of the vessel at the place of loading it was found that by reason of the presence of other vessels the loading could not be done within the time specified and the vessel left to save insurance; *Marwick v. Rogers*, 163 Mass. 50, 47 Am. St. Rep. 436, 39 N. E. 780 (dissenting opinion), on how charter-party contracts are to be construed.

The decision of the Court of Appeal was cited in *Williams v. Theobald*, 8 Sawy. 445, 15 Fed. 465, holding that charterer was "liable for detention under contract for voyage to San Francisco, or as near as vessel can safely get" and cargo was to be delivered alongside any steamer etc. directed by consignee, where vessel could not enter for time greater than that provided in charter-party.

Duty of charterer to provide a suitable place for the discharge of cargo.

Cited in *The Gazelle*, 128 U. S. 474, 32 L. ed. 496, 9 Sup. Ct. Rep. 139, holding a charter-party of a vessel to a safe, direct, port or as near as she can safely get and discharge afloat requires the charterer to order to a port which she can safely enter with a cargo on which has at least a safe anchorage outside; *Meneke v. Cargo of Java Sugar*, 187 U. S. 248, 47 L. ed. 163, 23 Sup. Ct. Rep. 86, holding under a similar contract the charterers had no right to order a vessel to unload at a dock above a bridge where the vessel could not always be afloat and under which her masts would not pass; *The Alhambra*, L. R. 5 Prob. Div. 256; *The Nether Holme*, 50 Fed. 434,—on duty of charterer with regard to providing a suitable place for discharge of cargo.

Termination of charter-party for delay.

Cited in *Jordan v. Great Western Ins. Co.* 24 N. B. 421, holding a charterer had a right to terminate a charter party contract where after the vessel had started to port to load cargo it was frozen and delayed until after the close of the shipping season for that particular cargo; *Schofield v. Carvill*, 21 N. B. 558; *Musgrave v. Mannheim Ins. Co.* 32 N. S. 405; *Owen v. Oterbridge*, 26 Can. S. C. 272.—on delay in carrying out charter-party contract as giving right to terminate.

Cited in note in 5 Eng. Rul. Cas. 687, on discharge of charterer by detention of ship.

Lay days, when commence to run.

Cited in *Re 2,098 Tons of Coal*, 67 C. C. A. 671, 135 Fed. 317, holding the lay days for the discharging of a cargo did not commence to run until the vessel arrived ready to unload at the dock specified in the charter party; *Carrizzo v. New York, S. & W. R. Co.* 66 Misc. 243, 123 N. Y. Supp. 173, to the point that where vessel is to discharge at specified dock, her lay days for discharging do not begin to run till she is actually along side such dock; *Lovitt v. Snowball*, 33 N. B. 263, holding the lay days commenced to run from the time the vessel arrived at the port and notice was given to the charterer that it was ready to receive the cargo; *Monsen v. Macfarlane & Co.* [1895] 2 Q. B. 562, 65 L. J. Q. B. N. S. 57, 73 L. T. N. S. 548, 8 Asp. Mar. L. Cas. 93, holding the lay days commenced to run from the day that notice was given that the ship was ready in the dock to be loaded; *Leonis S. S. Co. v. Rank*, [1907] 1 K. B. 344, 76 L. J. K. B. N. S. 342, 96 L. T. N. S. 458, 23 Times L. R. 215, 12 Com. Cas.

173, 10 Asp. Mar. L. Cas. 398, holding the lay days did not begin to run against a vessel until after the vessel obtained a berth alongside the loading pier.

Cited in note in 9 Eng. Rul. Cas. 215, 217, as to when lay days being to run.

The decision of the Court of Appeals was cited in *Gronstadt v. Witthoff*, 22 Blackf. 360, 15 Fed. 265, holding that where bill of lading contains nothing to indicate contrary intention, stipulated lay days should be held not to begin to run as against consignees of cargo until vessel has arrived at her berth; *Cushing v. McLeod*, 2 N. B. Eq. 63, holding that where vessel was to proceed to designated port for lumber, lay days did not commence to run until delivery of cargo began,—cargo not being in readiness.

Construction of contracts.

Cited in *Lovitt v. King*, 43 Can. S. C. 106 (dissenting opinion), on propriety of taking into consideration surrounding circumstances in construing contract; *Morang & Co. v. Le Sueur*, 45 Can. S. C. 95, Ann. Cas. 1912B, 602, holding that where parties have not expressed their intentions in particular event which has happened, but have left them to implication, court must assume that parties intended to stipulate for that which is fair and reasonable.

9 E. R. C. 261, *DICKINSON v. MARTINI*, 1 Sc. Sess. Cas. 4th series, 1185.

Duty as to lightening ship.

Cited in note in 9 E. R. C. 267, on duty to provide for lightening ship incapable of otherwise entering port.

9 E. R. C. 267, *THE ALHAMBRA*, 4 Asp. Mar. L. Cas. 410, 50 L. J. Prob. N. S. 36, L. R. 6 Prob. Div. 68, 29 Week. Rep. 655, reversing the decision of the Admiralty Division, reported in L. R. 5 Prob. Div. 256, 49 L. J. Prob. N. S. 73, 43 L. T. N. S. 31.

See S. C. 8 E. R. C. 351.

9 E. R. C. 269, *PORTEUS v. WATNEY*, 4 Asp. Mar. L. Cas. 34, 47 L. J. Q. B. N. S. 643, 39 L. T. N. S. 195, L. R. 3 Q. B. Div. 534, 27 Week. Rep. 30.

Construction of charter party contract with bill of lading.

Cited in *Gullischen v. Stewart Bros.* L. R. 11 Q. B. Div. 186, 52 L. J. Q. B. N. S. 648, 49 L. T. N. S. 198, holding a condition in a charter party contract that the charterers be released from liability as soon as cargo is received on board may be rejected where the bill of lading makes the goods deliverable to the charterers themselves, they paying the freight.

Incorporation of conditions of charter party into bill of lading.

Cited in *Burrill v. Crossman*, 65 Fed. 104, holding that reference in bill of lading to "freight as per charter party" did not impose on consignee duty of paying charter demurrage; *Crossman v. Burrill*, 179 U. S. 100, 45 L. ed. 106, 21 Sup. Ct. Rep. 38; *Dayton v. Parke*, 142 N. Y. 391,—holding that if bill of lading is silent on subject of demurrage, and does not make charter party on that particular subject part of itself, no contract is proved from acceptance of cargo under promise to pay freight as provided in charter party; *Serraino v. Campbell* [1891] 1 Q. B. 283, 60 L. J. Q. B. N. S. 303, 64 L. T. N. S. 615, 39 Week. Rep. 356, 7 Asp. Mar. L. Cas. 48 (affirming L. R. 25 Q. B. Div. 501, 63 L. T. N. S. 107), holding an exception in the charter party, of "stranding occasioned by negligence of the master" was not incorporated into the bill of lading because of the words "all other conditions as per charter."

Cited in note in 41 L. ed. U. S. 939, on demurrage.

Cited in *Porter*, Bills of L. 56, on provisions in charter party becoming part of bill of lading by reference thereto.

Bill of lading as giving a lien for demurrage.

Cited in *Forsyth v. Sutherland*, 31 N. S. 400, on bill of lading as giving a lien on the cargo for demurrage.

Lien on cargo of third persons for freight and demurrage under charter party.

Cited in *Leisy v. Buyers*, 36 La. Ann. 705, holding that condition of charter-party "vessel to have lien on cargo for freight, dead freight, and demurrage" though finding between parties only affects cargo shipped by third persons when latter have consented to it.

Liability of charterer for demurrage on unavoidable delay.

Cited in *Burrill v. Crossman*, 16 C. C. A. 381, 35 U. S. App. 608, 69 Fed. 747, holding that where charter stipulates rate of discharge, charterers were liable for delay beyond time fixed though caused by acts of public enemy; *Budgett v. Binnington*, L. R. 25 Q. B. Div. 320, 39 Week. Rep. 131, 60 L. J. Q. B. N. S. 1, [1891] 1 Q. B. 35, 6 Asp. Mar. L. Cas. 592, holding there being no stipulation in the charter-party or bill of lading a charterer was liable for demurrage where there was a delay in unloading by reason of a strike of laborers employed to unload ship; *Allen v. Coltart*, L. R. 11 Q. B. Div. 782, 52 L. J. Q. B. N. S. 686, 48 L. T. N. S. 944, 31 Week. Rep. 841, 5 Asp. Mar. L. Cas. 104, on the liability of charterer for demurrage; *Hick v. Rodocanachi* [1891] 2 Q. B. 626, 61 L. J. Q. B. N. S. 42, 65 L. T. N. S. 300, 40 Week. Rep. 161, 7 Asp. Mar. L. Cas. 97, 56 J. P. 54, on delay in unloading as giving owner of ship a right of action for demurrage.

Cited in note in 9 Eng. Rul. Cas. 232, on liability to demurrage for delay after expiration of lay days due to acts of third parties.

Distinguished in *Castlegate S. S. Co. v. Dempsey* [1892] 1 Q. B. 54, 61 L. J. Q. B. N. S. 263, 65 L. T. N. S. 755, 40 Week. Rep. 335 (reversed [1892] 1 Q. B. 854, 61 L. J. Q. B. N. S. 620, 66 L. T. N. S. 742, 40 Week. Rep. 533, 7 Asp. Mar. L. Cas. 186), holding where cargo was "to be discharged with all despatch as customary" charterers were liable for delay from strike but not for that of dock owners who according to custom discharged all vessels and whose dilatoriness was well known; *Tweedie Trading Co. v. New York C. & H. R. R. Co.* 194 Fed. 281, holding that shipper was not chargeable with demurrage under contract to "receive cargo as fast as steamer can unload," where cargo of other shippers was stored above defendants and had to be first unloaded, if he was ready to receive cargo as soon as reached.

Lien for freight and storage charges.

Cited in *Winchester v. Busby*, 16 Can. S. C. 336, holding that master of vessel was liable in trover for refusal to deliver unless freight and storage was pre-paid.

When lay days begin to run.

Cited in *Grinstad v. Witthoff*, 22 Blatchf. 360, 15 Fed. 265, holding that where bill of lading contains nothing to indicate contrary intentions, stipulated lay days should be held not to begin to run as against consignees of cargo until vessel has arrived at her berth.

9 E. R. C. 283, *GIBLIN v. M'MULLEN*, 38 L. J. P. C. N. S. 25, L. R. 2 P. C. 317, 21 L. T. N. S. 214, 5 Moore, P. C. C. N. S. 434, 17 Week. Rep. 445.

See S. C. 3 E. R. C. 613.

9 E. R. C. 287, *DOE EX DEM. BIRTWHISTLE v. VARDILL*, 6 Bing. N. C. 385, 7 Clark & F. 895, 4 Jur. 1076, 1 Scott, N. R. 828, West, 500, 2 Clark & F. 571, reaffirming on rehearing 9 Bligh, N. R. 32, reporting 6 Bligh, N. R. 479, which affirms the decision of the court of King's Bench, reported in 5 Barn. & C. 438, 4 L. J. K. B. 190, 8 Dowl. & R. 185.

See S. C. 5 E. R. C. 748 et seq.

9 E. R. C. 289, *RIGHT EX DEM. MITCHELL v. SIDEBOTHAM*, 2 Dougl. K. B. 759.

Construction of will.

Cited in *Carr v. Porter*, 1 McCord, Eq. 60; *Stevens v. Underhill*, 67 N. H. 68, 36 Atl. 370 (dissenting opinion),—on the construction of wills; *Jackson ex dem. Harris v. Harris*, 8 Johns. 141, on how particular words used in a will are to be construed; *Haines v. Witmer*, 2 Yeates, 400, holding that remainders over were too remote, under devise of several tracts of land to several children, their heirs and assigns forever, but providing that if either of children should die without issue, then each and every of their shares should be equally divided amongst survivors.

Cited in note in 12 E. R. C. 26, on right of executors to residuary estate undisposed of by will.

—Enlargement or reduction of devise by implication.

Cited in *Howland v. Union Theological Seminary*, 3 Sandf. 82, holding a specific devise could not be enlarged by a republication.

Cited in note in 10 E. R. C. 833, as to when cross remainders will be implied.

—As to fee or lesser estate.

Cited in *Lippett v. Hopkins*, 1 Gall. 454, Fed. Cas. No. 8380, holding a person under a devise to him with a remainder to his brothers and sisters if he dies before he arrives at the age of twenty-one, takes an estate in fee simple with an executory devise over; *Smith v. Furbish*, 68 N. H. 123, 47 L.R.A. 226, 44 Atl. 398, on construction of devise in general terms as one in fee rather than for life; *Hall v. Goodwyn*, 2 Nott & McC. 383, holding a devise of lands without words of perpetuity vested only a life estate where nothing in will from which a fee can be raised by implication: *Doe ex dem. Whitney v. Stanton*, 7 N. B. 632, holding a devise by testator of two lots to be divided between sons after a devise of the income of all real estate to wife during life, conveyed only a life estate to the sons.

—To prevent intestacy.

Cited in *Farish v. Cook*, 78 Mo. 212, 47 Am. Rep. 107, on when a residuary clause will be construed so as to prevent an intestacy.

—Words descriptive of entire interest of testator.

Cited in *Fogg v. Clark*, 1 N. H. 163, holding the devisee under a devise in the words "I will all my landed estate" in a particular place to a particular person, took a fee; *Jackson ex dem. Wells v. Wells*, 9 Johns. 222, holding a devise to an eldest son of all that part of land that testator then lived on vested only a life estate in such son; *French v. McIlhenny*, 2 Binn. 13, holding a devise to nephews of all of plantation except the interest therein which he had given to his wife which was a life estate therein vested an estate in fee in the nephews.

—Words of disinheritance of heir.

Cited in *Boisseau v. Aldridge*, 5 Leigh, 222, 27 Am. Dec. 590 (dissenting opinion), on the exclusion of an heir as raising estate by implication in another:

Notes on E. R. C.—59.

Coberly v. Earle, 60 W. Va. 295, 54 S. E. 336, holding that heir cannot be disinherited as to undevise land, by the strongest declaration, that he shall not take.

—Disposing intent manifested in introductory clause.

Cited in *Spear v. Hannum*, 2 Yeates, 380; *Kennon v. M'Roberts*, 1 Wash. (Va.) 96, 1 Am. Dec. 428; *Wyatt v. Sadler*, 1 Munf. 537 (dissenting opinion); *Wright v. Denn*, 10 Wheat. 204, 6 L. ed. 303; *Sheafe v. Cushing*, 17 N. H. 508,—on the effect of an introductory clause on the subsequent language of the will in case of ambiguity.

Words essential to creation of an estate of inheritance by devise.

Cited in *Re Reed*, 7 Penn. (Del.) 30, 76 Atl. 617, holding that words "one half of the farm where I now reside" are merely descriptive of property devised, and in no sense determine estate that should pass; *Beall v. Holmes*, 6 Harr. & J. 205; *Smith v. Shriver*, 3 Wall. Jr. 219, Fed. Cas. No. 3,108; *Pratt v. Leadbetter*, 38 Me. 9,—on how the intention of the testator must be disclosed to vest an estate of inheritance; *Doe ex dem. Hitch v. Patten*, 8 Houst. (Del.) 334, 2 L.R.A. 724, 16 Atl. 558; *Lillibridge v. Adie*, 1 Mason, 224, Fed. Cas. No. 8350,—on what necessary to pass an estate of inheritance by will.

Words essential to disinherit by will.

Cited in *Beard v. Beard*, 22 W. Va. 130, on how an heir may be disinherited.

Mistake in use of word in will.

Cited in *Comstock v. Headlyme Ecclesiastical Soc.* 8 Conn. 254, 20 Am. Dec. 100, holding the mistake of a scrivener in omitting a provision which the testator supposed was inserted in, did not render the will void where duly executed; *Dunham v. Averill*, 45 Conn. 61, 29 Am. Rep. 642, on a mistake on drafting as not rendering a will void.

9 E. R. C. 301, *COOPER v. FRANCE*, 14 Jur. 214, 19 L. J. Ch. N. S. 313.

Seisin by inheritance as source of descent.

Criticized in *Wigle v. Merriek*, 8 U. C. C. P. 307, holding the husband of a deceased wife cannot be tenant by the curtesy except of lands of which his wife was seized of such an estate as that her issue by him would inherit as heir to her.

Construction of inheritance act with reference to descent of coparcener's estate.

Cited in *Re Matson*, 66 L. J. Ch. N. S. 695, [1897] 2 Ch. 509, 77 L. T. N. S. 69, holding on the death intestate of the son of a co-parcener of the purchaser of land, the entire share descended on the nephew of such son rather than on a sister of the co-parcener.

Title by purchase or descent.

Distinguished in *Owen v. Gibbons* [1902] 1 Ch. 636, 71 L. J. Ch. N. S. 338, 86 L. T. N. S. 571, referring to cited case as dictum and holding that devise to "right heirs" now passes title by devise and not by intestacy.

Application of statute in consonance with existing law.

Cited in *Re Shaver*, 31 U. C. Q. B. 603, holding abrogation of joint tenancies did not abolish tenancy by entirety.

9 E. R. C. 306, *CROSSFIELD v. SUCH*, 1 C. L. R. 668, 8 Exch. 159, 22 L. J. Exch. N. S. 65, 1 Week. Rep. 82.

Necessity of pleading defence of return of goods in detainue.

Cited in *Johnson v. Lamb*, 13 U. C. Q. B. 508, on necessity that in action of detainue a defence that the goods had been returned to plaintiff should be pleaded.

Recovery of special damages in detainue.

Cited in *Bain v. McDonald*, 32 U. C. Q. B. 190, on the recovery of special damages in detainue.

9 E. R. C. 311, *LATTER v. WHITE*, 41 L. J. Q. B. N. S. 342, L. R. 5 H. L. 578, affirming the decision of the Exchequer Chamber, reported in 40 L. J. Q. B. N. S. 162, 25 L. T. N. S. 158, 19 Week. Rep. 1149, which affirms the decision of the Court of Queen's Bench, reported in 40 L. J. Q. B. N. S. 9.

Inference of fact from facts stated.

Cited in *Traflet v. Empire L. Ins. Co.* 64 N. J. L. 387, 46 Atl. 204, on the derivation of the power of the English courts of error to draw inferences of fact from the facts stated.

9 E. R. C. 321, *SEAMAN v. DEE*, 2 Lev. 40, 1 Vent. 198, 2 Keble 860, 879, 3 Keble 15.

Indebitatus assumpsit.

Cited in *Lacaze v. State, Addison (Pa.)* 59, on when action of indebitatus assumpsit would lie.

Devastavit by executors.

Cited in *Re Stevens* [1898] 1 Ch. 162, 67 L. J. Ch. N. S. 118, 77 L. T. N. S. 508, 14 Times L. R. 111, 46 Week. Rep. 177, on right to render executors liable as for a devastavit.

Cited in notes in 9 Eng. Rul. Cas. 339, on estoppel of executor or administrator to deny having assets of decedent for satisfaction of creditor's demands; 12 E. R. C. 9, on derivation of executor's title from will; 16 E. R. C. 153, on suspension of limitations by death of debtor.

Liability of estate for interest on debts or charges.

Cited in *Adams v. Adams*, 10 Leigh, 527, holding annuitants could not charge the estate of testator with interest where the executors failed to set aside a sum to produce the required income and died insolvent.

Interest as damages.

Cited in *Howe v. Bradley*, 19 Me. 31 (dissenting opinion), on interest as being the damages for the detention of the debt; *Dickenson v. Harrison*, 18 E. R. C. 474, 4 Price, 282, 18 Revised Rep. 711, holding interest may be waived and principal declared on alone.

Waiver by attorney.

Cited in *Weeks, Attys.* 2d ed. 234, on waiver by attorney of privilege of not being sued.

9 E. R. C. 328, *BARRY v. RUSH*, 1 Revised Rep. 360, 1 T. R. 691.

Contracts by executors or administrators as admission of assets.

Cited in *Bank of Troy v. Topping*, 13 Wend. 557, holding a promissory note executed by an administrator is prima facie evidence of assets; *Livingston*

v. Pettigrew, 7 Lans. 405, on a submission by executors or administrators to arbitration as being evidence of assets.

Personal liability of executors or administrators on contract.

Cited in *Avera v. Beekom*, 11 Ga. 1, holding an administrator who on the sale of a slave warranted him to be sound as far as his office authorized him was personally liable on such warranty; *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83, holding administrators were personally liable upon their covenant warranting the title on the sale of decedents' real estate; *Curtis v. Bank of Somerset*, 7 Harr. & J. 25; *Davis v. French*, 20 Me. 21, 37 Am. Dec. 36,—on executor or administrator as being personally liable on a promise to pay the debt of the decedent.

Cited in notes in 12 E. R. C. 59, 63, on liability of executor or administrator for rent; 2 Eng. Rul. Cas. 164, on administrator making himself liable for debts of estate by contract.

—On award of arbitrators.

Cited in *Kinloch v. Palmer*, 2 Mill. Const. 215; *Powers v. Douglass*, 53 Vt. 471, 38 Am. Rep. 699; *Bean v. Farnam*, 6 Pick. 269,—holding an administrator submitting to arbitration of a demand against the estate was bound personally by the award; *McKeen v. Oliphant*, 18 N. J. L. 442, on an administrator as being personally bound by his submission to an award.

—In absence of contract.

Cited in *East Hartford v. Pitkin*, 8 Conn. 393, on whether an executor would be liable for supplies furnished to a slave after the death of the master.

Liability of agent or representative on contract.

Cited in *Whiteside v. Jennings*, 19 Ala. 784, holding a bond for title executed by commissioners appointed to sell real estate belonging to a decedent, conditioned that they shall make a fee simple title to the land, is binding upon them personally; *Underhill v. Gibson*, 2 N. H. 352, 9 Am. Dec. 82; *Stinchfield v. Little*, 1 Me. 231, 10 Am. Dec. 65,—on when agent personally liable on a contract executed on behalf of principal.

Authority of administrators or executors to submit to arbitration.

Cited in *Grace v. Sutton*, 5 Watts. 540, holding one of two administrators may submit a matter in dispute between himself in right of his intestate and another to arbitration; *Mulligan v. Wright*, 16 U. C. Q. B. 408; *Wood v. Tunnicliff*, 74 N. Y. 38,—on executors or administrators as having the authority to submit to arbitration demands existing either for or against the estate.

Right to submit to arbitration.

Cited in *District of Columbia v. Bailey*, 9 App. D. C. 360, holding that in absence of statutory prohibition right to submit to arbitration, is as broad as right to sue and be sued.

9 E. R. C. 330, *ERVING v. PETERS*, 1 Revised Rep. 794, 3 T. R. 685.

Admission of assets by failure of executor or administrator to plead plene administravit.

Cited in *Southard v. Potts*, 22 N. J. L. 278; *Platt v. Robins*, 1 Johns. Cas. 276, 1 Am. Dec. 110; *Ruggles v. Sherman*, 14 Johns. 446; *Thurlough v. Kendall*, 62 Me. 166,—on failure to plead want of assets in original action as creating presumption of existence of assets; *Hogg v. White*, 2 N. C. (Hayw.) 298; *Newcomb v. Goss*, 1 Met. 333,—on an administrator as being person-

ally liable where he suffers judgment to be taken against him before representing the decedent's estate as insolvent.

Cited in note in 12 E. R. C. 59, 63, on liability of executor or administrator for rent.

—Conclusiveness of judgment where plene administravit not pleaded.

Cited in *Thrash v. Sumwalt*, 5 Ala. 13, on conclusiveness of general verdict where plene administravit not pleaded; *Seranton v. Demere*, 6 Ga. 92, holding the failure of executors to plead plene administravit, where a decree is rendered against them operates as establishing fact that sufficient assets existed at time of rendition of decree; *Howell v. Potts*, 20 N. J. L. 1, holding a judgment against an executor or administrator is conclusive against him where no plea of plene administravit; *Trimmier v. Thomson*, 19 S. C. 247, on judgment as being conclusive evidence of assets where no plea of plene administravit; *Young v. Kennedy*, 2 McMull. L. 80, holding a judgment in an action where administrator fails to plead plene administravit is prima facie evidence to charge administrator in an action suggesting a devastavit; *Micheau v. Caldwell*, 1 Speers, L. 276, holding the judgment de bonis testator's where plene administravit was not pleaded is conclusive evidence of assets against administrator in action of debt suggesting a devastavit.

—Default judgment.

Cited in *Dickson v. Wilkinson*, 3 How. 57, 11 L. ed. 491, on judgment by default against an administrator as being an admission of assets.

Right to plead plene administravit in action on judgment against representative.

Cited in *Hatch v. Eustis*, 1 Gall. 160, Fed. Cas. No. 6,207, holding that if, after verdict, and before judgment, defendant die, and his administrator becomes party to suit, and judgment is against him, he may plead on seire facias that he has no assets; *Hooks v. Moses*, 30 N. C. (8 Ired. L.) 88, holding in an action on a judgment the plea of plene administravit is immaterial where, the judgment is conclusive of assets; *Wood v. Leeming*, 2 U. C. Q. B. O. S. 542, holding an executor is estopped to plead plene administravit to a declaration or seire facias to revive a judgment against himself.

Personal liability of executor or administrator on judgments.

Cited in *Thomas v. Thompson*, 2 Johns. 471, holding the recovery of a judgment against an administratrix rendered her personally liable in the absence of assets.

Liability of executors and administrators for costs.

Cited in *Pillsbury v. Hubbard*, 10 N. H. 224, on liability of executors and administrators for costs in actions against them; *Folsom v. Blaisdell*, 38 N. H. 100, on liability of executors and administrators for costs.

Judgment and execution as predicate for devastavit.

Cited in *Bobe v. Frowner*, 18 Ala. 89, on it not being necessary that a fieri facias be sued out, on a suit on an original judgment where devastavit is charged in the declaration; *Taylor v. Stewart*, 5 Call. (Va.) 520, holding a judgment against the executor is necessary before an action can be maintained upon his administration bond; *Taliaferro v. Thornton*, 6 Call. (Va.) 21, on necessity that a demand be established before an action can be brought on the administration bond.

Form of judgment against executor or administrator.

Cited in *Inferior Ct. Justices v. Sloan*, 7 Ga. 31, holding on a suit against an administrator the judgment must be *de bonis testatoris* except where he pleads *re unques. executor*.

How objection of non-joinder of executors can be taken.

Cited in *Union Bank v. Harrison*, 11 C. L. R. (Austr.) 492, holding that at common law co-executors were regarded as one person, and objection of non-joinder of one could be taken only by plea in abatement.

Conclusiveness of judgment.

Cited in *Hamilton v. Woodruff*, 14 U. C. C. P. 22, on verdict in former action as bar to subsequent proceedings growing out of same matter.

— Right to raise defences which might have been raised before.

Cited in *McLeod v. Harper*, 43 Miss. 42, on no right as existing to make defenses which might have been pleaded in the original action; *First Nat. Bank v. Wallis*, 59 N. J. L. 46, 34 Atl. 983, holding the validity of a judgment of another state cannot be impeached for any supposed defect in the transaction in which it was founded; *Willis v. Tozer*, 44 S. C. 1, 21 S. E. 617; *People ex rel. Fogalsonger Judges of Erie County*, 4 Cow. 445,—on failure to plead matter in bar as estopping person to do so in a subsequent proceeding founded on the original action.

Right to raise objections which might been taken earlier in trial.

Cited in *Hollingsworth v. Duane*, Wall. Sr. 147, Fed. Cas. No. 6,618, to the point that it is against policy of law to allow party to take objection at later period of proceeding, after trial which he might have taken in earlier stage.

9 E. R. C. 342, RE ROWNSON, L. R. 29 Ch. Div. 358, 49 J. P. 759, 54 L. J. Ch. N. S. 950, 52 L. T. N. S. 825, 33 Week. Rep. 664.

Devastavit by payment of barred debt.

Cited in *Midgley v. Midgley* [1893] 3 Ch. 282, 62 L. J. Ch. N. S. 905, 2 Reports, 561, 69 L. T. N. S. 241, 41 Week. Rep. 659, holding an administrator would be guilty of a devastavit in paying a debt judicially declared to be barred by the statute of limitations.

Cited in note in 9 Eng. Rul. Cas. 323, on liability of executor or administrator for devastavit.

Cited in *Benjamin. Sales*, 5th ed. 306, 307, on payment of unenforceable debt by executor as a devastavit.

— By payment of debt unenforceable because within statute of frauds.

Cited in *Browne. Stat. Frauds*, 5th ed. 161, on right of administrator to retain money out of assets to pay claim unenforceable because of statute of frauds.

— By payment of debt known to be without consideration.

Cited in *Re Williams*, 27 Ont. Rep. 405, holding that executors could not be allowed credit for money paid on notes of testator, which they knew were made without consideration.

Liability of co-surety where barred debt paid by surety.

Cited in *Patterson v. Campbell*, 44 N. S. 214, holding that surety who pays note barred by statute of limitations cannot establish claim against co-surety.

Duty of executors or administrators as to pleading statute of limitations.

Cited in *Haskell v. Monson*, 200 Mass. 599, 128 Am. St. Rep. 452, 86 N. E.

937, on it not being necessary that an executor or an administrator plead the statute of limitations.

9 E. R. C. 351, *ELLIOT v. WILSON*, 4 Bro. P. C. 470.

Deviation from the course of voyage by entry at port beyond terminus.

Cited in *Stevens v. Commercial Mut. Ins. Co.* 26 N. Y. 397, holding where a vessel was insured for a voyage to a particular port it was a deviation when the vessel touched at another port after going to designated port although it was necessary according to the commercial regulations of the country; *Fernandez v. Great Western Ins. Co.* 48 N. Y. 571, 8 Am. Dec. 571, holding vessel to sail from New York to Havana deviated by going first to a near-by port even on a trial trip; *Hearn v. New England Mut. Marine Ins. Co.* 3 Cliff. 318, Fed. Cas. No. 6,301, holding where the voyage was to a particular port, the going to another port in the same country constituted a deviation; *Mannheim Ins. Co. v. Atlantic & L. S. R. Co.* Rap. Jud. Quebec, 11 B. R. 200, holding that deviation actually committed releases insurer, although ship returned to course without injury or change of risk.

Cited in note in 9 E. R. C. 390, on change in order of visiting different ports named in policy as deviation.

9 E. R. C. 357, *HARE v. TRAVIS*, 7 Barn. & C. 14, 9 Dowl. & R. 748, 5 L. J. K. B. 348, 31 Revised Rep. 139.

Deviation necessary to terminate contract of marine insurance.

Cited in *Crowell v. Geddes*, 5 N. S. 184, holding where a vessel insured to a particular port and return on reaching such port, took no cargo for the home port but took a cargo for another port, and there was an intention not to return to the home port the underwriters were relieved from liability for the loss of the vessel; *Merrill v. Boylston F. & M. Ins. Co.* 3 Allen, 247, on temporary deviation after commencement of voyage as not terminating the policy of insurance; *Fernandez v. Great Western Ins. Co.* 3 Robt. 457 (dissenting opinion); *Bearns v. Columbian Ins. Co.* 48 Barb. 445,—on when a deviation will relieve underwriters on policy of insurance.

Apportionable liability of underwriters, how arrived at.

Cited in *Pitman v. Universal Marine Ins. Co.* L. R. 9 Q. B. Div. 192, 51 L. J. Q. B. N. S. 561, 41 L. T. N. S. 863, 30 Week. Rep. 906, 4 Asp. Mar. L. Cas. 544, 14 Eng. Rul. Cas. 462, on the mode of estimating the liability of the underwriters on the injury partially covered.

9 E. R. C. 365, *RAINE v. BELL*, 9 East. 195, 9 Revised Rep. 533.

Deviation from voyage by calling and staying or loading.

Cited in *Sage v. Middleton Ins. Co.* 1 Conn. 239, holding the insurers of a vessel from a port in Europe to a port of discharge in the United States were liable for a loss where the vessel reached a port and waited a reasonable time for orders and then proceeded to another port with the intention of making it the port of discharge; *Hughes v. Union Ins. Company*, 3 Wheat. 159, 4 L. ed. 529; *Thorndike v. Bordman*, 4 Pick. 471,—holding under a policy granting leave to a ship to touch at a port the ship may there take on a cargo without its being considered a deviation, there being no delay or change in the risk; *Creighton v. Union Marine Ins. Co.* 2 N. S. 195, holding the putting in of a

vessel at an intermediate port at which she had been granted permission to touch and the taking on of cargo did not avoid the policy.

Cited in note in 13 Eng. Rul. Cas. 618, on construction of policy insuring ship for voyage "at and from" specified foreign port.

—Jury question.

Cited in *Foster v. Jackson M. Ins. Co.* 1 Edm. Sel. Cas. 290, holding it for jury whether delay under the particular circumstances was justifiable.

Alterations or additions to the property insured as avoiding the policy.

Cited in *Jolly v. Baltimore Equitable Soc.* 1 Harr. & G. 295, 18 Am. Dec. 288, on when alterations or additions to the property insured will avoid the policy.

9 E. R. C. 372, *HAMMOND v. REID*, 4 Barn. & Ald. 72, 22 Revised Rep. 629.

Deviation avoiding policy of marine insurance.

Cited in *Gambles v. Ocean M. Ins. Co.* L. R. 1 Exch. Div. 8, holding underwriters were not liable on a policy of insurance on a vessel for a voyage and a certain time after reaching port where within such time after reaching port she moved to a new loading place and began to take on a new cargo.

Distinguished in *Thorndike v. Bordman*, 4 Pick. 471, holding under a policy of insurance giving ship privilege to touch at an intermediate port the taking on of a cargo did not avoid the policy, the risk not having been increased thereby.

Avoidance of marine insurance for delay.

Cited in *Thebaud v. Great Western Ins. Co.* 84 Hun, 1, 31 N. Y. Supp. 1084, on delay of vessel in starting on voyage as grounds for avoiding a policy of insurance.

9 E. R. C. 384, *CLASON v. SIMMONDS*, 3 Revised Rep. 260, 6 T. R. 533.

"Deviation" in contracts of insurance.

Cited in notes in 9 Eng. Rul. Cas. 361, on vitiation of policy by deviation; 9 Eng. Rul. Cas. 376, on what action at intermediate port constitutes a deviation.

9 E. R. C. 385, *BEATSON v. ILAWORTH*, 3 Revised Rep. 258, 6 T. R. 531.

Deviation by making ports in inverse order.

Cited in *Gilfert v. Hallet*, 2 Johns. Cas. 296, holding a policy of marine insurance was not terminated by the sale of part of cargo at port insured to where all could not be sold and the ship on the return had to put into port for provisions where the voyage was abandoned; *Reed v. Weldon*, 12 N. B. 460, holding that no deviation occurred where vessel was lost before reaching first port designated, although intention was to deviate from route agreed upon, if such first port had been reached.

Distinguished in *Thorndike v. Bordman*, 4 Pick. 471, holding insurance "to any port beyond G., one or more times to the same port for the purpose of selling outward and procuring return cargo" was not violated by selling, buying and reselling all for purpose of getting full cargo and returning to same ports to do so.

9 E. R. C. 391, *HARTLEY v. BUGGIN*, 3 Dougl. K. B. 39.

Deviation by unusual use of ship.

Cited in *Leitch v. Atlantic Mut. Ins. Co.* 66 N. Y. 100, holding the failure to stow the cargo insured in the usual and customary manner was such a deviation as to avoid the policy.

Cited in note in 9 Eng. Rul. Cas. 362, on vitiation of policy by deviation.

— Delay.

Cited in *Reed v. Weldon*, 12 N. -B. 460, holding that putting ship in blocks, detaining her 17 days and releasing her was equivalent to deviation; *Phillips v. Irving*, 9 E. R. C. 396, 7 Mann. & G. 325-329, 8 Scott N. R. 3, 13 L. J. C. P. N. S. 145, holding reasonable delay to effect purposes of the voyage is no deviation.

— Delays extrinsic to purpose of voyage.

Cited in *Day v. Orient Mut. Ins. Co.* 1 Daly, 13, holding that voluntary voyage to any prohibited port amounted to breach of warranty of insured not to enter such ports, and that from that time policy ceased to cover or protect vessel; *African Merchants' Co. v. British & F. M. Ins. Co.* L. R. 8 Exch. 154, 42 L. J. Exch. 60, 28 L. T. N. S. 233, 21 Week. Rep. 484, 1 Asp. Mar. L. Cas. 588, holding a delay of a vessel in commencing the return voyage after being loaded, for a purpose in no way connected with the trade was a sufficient deviation to avoid the policy.

— Jury questions.

Cited in *Child v. Sun Mut. Ins. Co.* 3 Sandf. 26, holding it proper for jury to say whether "mating" with another whaling vessel was a deviation.

9 E. R. C. 396, *PHILLIPS v. IRVING*, 13 L. J. C. P. N. S. 145, 7 Mann. & G. 325, 8 Scott, N. R. 3.

Liability of insurer for unavoidable delay.

Cited in *Howard v. Astor Mut. Ins. Co.* 5 Bosw. 38, holding that insurer of passage money, by policy in usual form of freight policy, is not liable because vessel is delayed by perils of sea, if she actually carry to port of destination.

Deviation by delay.

Cited in *The Citta Di Messina*, 169 Fed. 472, holding that delay of vessel, even upon route prescribed by policy or bill of lading, may amount to deviation; *The Indrapura*, 171 Fed. 929, holding the placing of a vessel in dry dock after she had received her cargo for the purpose of painting her bottom, it not being a maritime necessity constituted a deviation which would avoid the policy; *Burgess v. Equitable M. Ins. Co.* 126 Mass. 70, 30 Am. Rep. 654, holding that in absence of evidence of usage to put into port for bait, doing so was deviation which discharged insurer.

— By going to other ports.

Cited in *Wright v. Holcombe*, 6 U. C. C. P. 531, holding that vessel under contract to carry goods from Port Credit to Quebec, voyage to Toronto and Oswego, was deviation making defendant, owner, liable.

Duties of trial judge.

Cited in *Baltimore & O. R. Co. v. Worthington*, 21 Md. 275, 83 Am. Dec. 578, 9 Am. Neg. Cas. 416 (dissenting opinion), on duty of judge to inform jury what duty devolves upon party

9 E. R. C. 402, *LAWRENCE v. SYDEBOTHAM*, 6 East, 45, 8 Revised Rep. 385, 2 Smith, 214.

Deviation by towing or conveying but without increased risk.

Cited in *Rendell v. Black Diamond S. S. Co.* Rap. Jud. Quebec, 8 C. S. 442, holding the taking of another vessel in tow was a deviation although the risk was not thereby increased; *Searamanga v. Stamp*, L. R. 5 C. P. Div. 295, 49 L. J. C. P. N. S. 674, 42 L. T. N. S. 840, 28 Week. Rep. 691, 4 Asp. Mar. L. Cas. 295, holding the leaving of her course by a vessel to answer a signal of distress and towing the vessel was such a deviation as would avoid the policy.

— By effort to save or protect ship's property.

Cited in *Perrin v. Leverett*, 13 Mass. 118, holding it was no unjustifiable deviation where the vessel was stranded while leaving the harbor and the cargo unloaded and carried by land to another port where the vessel again reshipped the cargo and continued the voyage; *Settle v. St. Louis Perpetual Marine L. & F. Ins. Co.* 7 Mo. 379, holding the departure of the vessel from the usual course of the voyage to save property was a deviation which would avoid the policy.

9 E. R. C. 413, *ELTON v. BROGDEN*, 2 Strange, 1264.

Deviation excusable by necessity.

Cited in *Burgess v. Equitable M. Ins. Co.* 126 Mass. 70, 30 Am. Rep. 654, holding the putting into the nearest practicable port after reaching the point of destination because of necessity of getting bait, was a fatal deviation.

Barratry, what constitutes.

Cited in *Atkinson v. Great Western Ins. Co.* 4 Daly, 1, holding the act of the master of a ship in stowing a cargo on deck instead of stowing it below as it should have been done did not amount to a barratry; *Hadfield v. Jameson*, 2 Munf. 53; *Hood v. Nesbitt*, 1 Yeates, 114, 1 Am. Dec. 265,—on what constitutes a barratry.

— By fraudulent deviation.

Cited in *Hood v. Nesbit*, 2 Dall. 137, 1 L. ed. 321, holding a mere deviation, without fraudulent intent does not amount to a barratry.

9 E. R. C. 419, *WISE v. METCALFE*, 10 Barn. & C. 299, 8 L. J. K. B. N. S. 126, 5 Mann. & R. 235.

Principle for the estimation of damages for dilapidation.

Cited in *Stafford v. Bell*, 31 U. C. C. P. 77; *Stammers v. O'Donohue*, 29 Grant, Ch. (U. C.) 207,—on the principle on which damages for dilapidation should be estimated.

Cited in notes in 64 L.R.A. 651, on tenant's duty to leave premises in good condition; 33 L.R.A.(N.S.) 669, 671, on duty of life tenant to repair.

Duty of the incumbent as to repairing his benefice.

Cited in *Langtry v. Dumoulin*, 11 Ont. App. Rep. 544, on the duty of the incumbent to repair his benefice and leave buildings in repair for his successor.

Abatement of action by death of party.

Cited in *Neal v. Haygood*, 1 Ga. 514, on the abatement of actions by the death of the party injured.

9 E. R. C. 436, *BELFOUR v. WESTON*, 1 Revised Rep. 210, 1 T. R. 310.

Liability of lessee under unconditional covenant to pay rent where enjoyment is prevented.

Cited in *Lewis v. Chisholm*, 68 Ga. 40, holding that a breach of the landlord's covenant to repair does not furnish a bar to an action for rent under an unconditional covenant therefor; *Hill v. Woodman*, 14 Me. 38, holding that the lessee of a wharf was bound to pay rent even though the wharf became unfit for use by natural decay; *Gluck v. Baltimore*, 81 Md. 315, 48 Am. St. Rep. 515, 32 Atl. 515, on the liability of the tenant for rent where the premises have been taken by condemnation proceedings; *Leavitt v. Fletcher*, 10 Allen, 19, holding that an unconditional covenant to pay rent was not affected by the injury to the premises, even though caused by act of lessor, whose covenants were separate; *Whitbeck v. Skinner*, 7 Hill, 53, on the liability of the lessee for rent where premises become untenable through breach of landlord's covenant to repair; *Allen v. Pell*, 4 Wend. 505, holding that it was no defense to an action for rent that the premises were untenable because not completed on time by the lessor, where the lessee had gone into possession; *Banks v. White*, 1 Sneed, 613, holding that where the leased premises became untenable during the term of the lease through no fault of the lessor, there could be no abatement of rent.

Cited in notes in 22 L.R.A. 614, on rights and liabilities of tenant on destruction of leased building; 15 Eng. Rul. Cas. 495, on termination of liability for rent by destruction of premises.

Distinguished in *Waite v. O'Neil*, 34 L.R.A. 550, 22 C. C. A. 248, 47 U. S. App. 19, 76 Fed. 408 (reversing in part 72 Fed. 348), holding that where a "landing" was leased, and subsequently the shore was washed away so that there remained a vertical bluff unfit for such use, the lessee was not liable for rent.

—By act of God.

Cited in *Coogan v. Parker*, 2 S. C. 255, 16 Am. Rep. 659, on the liability of a tenant for rent after the subject matter has been destroyed by act of God or public enemy.

Distinguished in *Ripley v. Wightman*, 4 M'Cord, L. 447, holding that if one rents a house for a year, and the same becomes untenable during the term because of a storm the rent ought to be apportioned.

—After house leased has burned.

Cited in *Ward v. Bull*, 1 Fla. 271, holding that a lessee who covenants to pay rent and repair, with express exception of casualties by fire, is liable upon the covenant for rent though the premises be burned down and not rebuilt; *Fowler v. Payne*, 49 Miss. 32, holding that where there is no covenant to repair and there is an unconditional one to pay rent, the tenant is liable for the rent after the building has been destroyed; *Wood v. Hubbell*, 10 N. Y. 479, on the liability of the lessee for rent under a term to commence in the future, where the property is burned before the commencement of the term; *Perkins v. Currier*, 3 Woodb. & M. 69, Fed. Cas. No. 10,985; *Graves v. Berdan*, 26 N. Y. 498, (dissenting opinion); *Howard v. Doolittle*, 3 Duer, 464; *Young v. Forgey*, 4 Hayw. (Tenn.) 9,—on the liability of a lessee for rent for the full term when the house is burned; *Hallett v. Wylie*, 3 Johns. 44, 3 Am. Dec. 457, holding that a destruction of the house by fire would not excuse the lessee from the payment of rent according to his covenant.

Cited in 2 Underhill, Land. & T. 1340, on liability of tenant for rent where buildings destroyed by fire.

Distinguished in *Graves v. Berdan*, 29 Barb. 100, holding that where the lease is for apartments in a building which is destroyed, the rent ceases.

Covenant of lessee to repair where thing is destroyed or damaged.

Cited in *Waite v. O'Neil*, 72 Fed. 348, holding that under lease of premises for river landing, with covenant by lessee to deliver up premises in good order . . . except usual wear and tear, lessee was not bound to repair damage done by extraordinary flood: *Pasteur v. Jones*, 1 N. C. pt. 2, p. 306 (Conference) 194, holding that where a tenant by lease covenanted to build and did build, but the house was destroyed by fire, he was bound to rebuild or pay the value of the house.

Cited in 1 *Thompson*, Neg. 1032, on liability to repair where premises are destroyed or injured by fire.

—Of hirer of property which has ceased to exist.

Cited in *Lennard v. Boynton*, 11 Ga. 109; *Hicks v. Parham*, 3 Hayw. (Tenn.) 224, 9 Am. Dec. 745,—holding that the hirer of a slave, who dies shortly after the commencement of the term of hiring must pay the full hire stipulated for; *Scott v. Scott*, 18 Gratt. 150, holding that where by the civil war slaves, that had been rented out for a term, were freed, the lessee was not entitled to an abatement of the rent.

Implied warranties as to continuing fitness of leased premises.

Cited in *Foster v. Peyser*, 9 Cush. 242, 57 Am. Dec. 43, holding that there was no implied warranty that the premises would continue fit for the purpose for which it is demised; *Davis v. George*, 67 N. H. 393, 39 Atl. 979, holding that in a lease of land there is no implied warranty that the premises are suitable for the purposes of the lessee's occupation; *Hart v. Windsor*, 9 E. R. C. 438, 12 Mees. & W. 68-88, 13 L. J. Exch. N. S. 129, 8 Jur. 150, denying any implied warranty that premises let for a dwelling were habitable.

Excuses for non-performance of covenant.

Cited in *Stone v. Dennis*, 3 Port. (Ala.) 231, on difficulty of performance as an excuse for nonperformance; *Pittsburgh & C. R. Co. v. Shaw*, 2 Monaghan (Pa.) 561, 14 Atl. 323, on the cessation or nonexistence of the subject matter as being no excuse for nonperformance of covenants relating thereto.

9 E. R. C. 438, *HART v. WINDSOR*, 8 Jur. 150, 13 L. J. Exch. N. S. 129, 12 Mees. & W. 68.

Implied warranties and covenants in a lease.

Cited in *Estep v. Estep*, 23 Ind. 114; *Rogan v. Dockery*, 23 Mo. App. 313,—holding that there is no implied covenant to repair on the part of the landlord; *Mershon v. Williams*, 63 N. J. L. 398, 44 Atl. 211, on an implied covenant for quiet possession as created by a lease; *Bulmer v. R.* 23 Can. S. C. 488 (affirming 3 Can. Exch. Rep. 184), on the implied warranty of title in a lease of land from the crown; *Budd-Scott v. Daniell* [1902] 2 K. B. 351, 71 L. J. K. B. N. S. 706, 87 L. T. N. S. 392, 18 Times L. R. 675, holding that upon the letting of a house for one year, there is an implied undertaking for quiet enjoyment.

Cited in 1 *Washburn Real Prop.* 6th ed. 394, on kinds of covenants in leases; 1 *Washburn Real Prop.* 6th ed. 396, on implied covenants by lessor; 1 *Washburn Real Prop.* 6th ed. 439, on tenant's liability to pay rent, repair and rebuild; 1 *Washburn Real Prop.* 6th ed. 447, on obligations implied in lease from nature of the premises; 2 *Underhill Land. & T.* 698, on implied covenant of quiet enjoyment in parol lease.

—Containing words, “to let” or “demise.”

Cited in *Bulmer v. R.* 3 Can. Exch. 184 (affirmed in 23 Can. S. C. 488), on the words demise or to let, or their equivalents in a lease as creating an implied covenant for quiet possession; *Mostyn v. West Mortyn Coal & I. Co.* L. R. 1 C. P. Div. 145, 45 L. J. C. P. N. S. 401, 34 L. T. N. S. 325, 24 Week. Rep. 401, holding that in a lease containing the words, “let” or “demise,” there is an implied warranty of title; *Baynes & Co. v. Lloyd & Son* [1895] 1 Q. B. 820 [1895] 2 Q. B. 610, 64 L. J. Q. B. N. S. 787, 14 Reports 678, 73 L. T. N. S. 250, 59 J. P. 710, 15 Eng. Rul. Cas. 752, on dictum that words to let in a lease as implying a covenant for quiet enjoyment; *Jones v. Lavington* [1903] 1 K. B. 253, 72 L. J. K. B. N. S. 98, 51 Week. Rep. 161, 88 L. T. N. S. 223, 19 Times L. R. 77, on the word “let” in a sublease as implying a covenant for quiet enjoyment.

—Of fitness for purposes for which demised.

Cited in *Rubens v. Hill*, 115 Ill. App. 565; *Libbey v. Tolford*, 48 Me. 316, 77 Am. Dec. 229; *Dutton v. Gerrish*, 9 Cush. 89, 55 Am. Dec. 45,—holding that there is no implied warranty of the fitness of the leased premises for any particular use; *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380, holding that upon the leasing of a factory and the machinery in it, there is no implied warranty that the machinery is in good repair or suitable for the purposes for which premises were let; *Scott v. Simons*, 54 N. H. 426; *Davis v. George*, 67 N. H. 393, 39 Atl. 979; *Murray v. Albertson*, 50 N. J. L. 167, 7 Am. St. Rep. 787, 13 Atl. 394; *Marks v. Delaglio*, 27 Misc. 652, 59 N. Y. Supp. 707; *McGlashan v. Tallmadge*, 37 Barb. 313,—holding that upon the leasing of realty there is no implied warranty of fitness for purposes for which the lessee desires them; *Franklin v. Brown*, 118 N. Y. 110, 6 L.R.A. 770, 16 Am. St. Rep. 744, 23 N. E. 126, holding same even though personal property was a part of the subject matter of the lease; *McKenzie v. Cheetham*, 83 Me. 543, 22 Atl. 469; *George v. Cypress Hills Cemetery*, 32 App. Div. 281, 52 N. Y. Supp. 1097 (dissenting opinion); *Eakin v. Brown*, 1 E. D. Smith, 36,—on the existence in a lease of an implied warranty of fitness for the purposes intended; *Taylor v. Reed*, 18 N. B. 58, holding that there is no implied warranty in a lease that the premises are fit for the purposes to be used for; *Searle v. Laverick*, L. R. 9 Q. B. 122, L. J. Q. B. N. S. 43, 30 L. T. N. S. 89, 22 Week. Rep. 367; *Westropp v. Elligott*, L. R. 9 App. Cas. 815,—on the existence of an implied warranty of fitness for the purpose for which leased; *Manchester Bonded Warehouse Co. v. Carr*, L. R. 5 C. P. Div. 507, 49 L. J. C. P. N. S. 809, 43 L. T. N. S. 476, 29 Week. Rep. 354, 45 J. P. 7, holding that there is no implied warranty that the premises are fit for the purposes intended; *Norris v. McFadden*, 159 Mich. 424, 124 N. W. 54 (dissenting opinion), on existence of implied warranty that premises are fit for use intended.

Cited in note in 33 L.R.A. 449, 450, on implied covenant in lease as to fitness of property for purpose intended.

—In lease of dwelling.

Cited in *Daly v. Wise*, 132 N. Y. 306, 16 L.R.A. 236, 30 N. E. 837, holding that there is no implied warranty in a lease that a house is free from inherent defects which would render it uninhabitable; *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *Foster v. Peyser*, 9 Cush. 242, 57 Am. Dec. 43; *Chadwick v. Woodward*, 13 Abb. N. C. 441,—holding that there is no implied warranty that a house is habitable; *Gillis v. Morrison*, 22 N. B. 207, holding that on the demise of an unfurnished house there is no implied warranty that the premises are in a tenable condition.

Distinguished in *Ingalls v. Hobbs*, 156 Mass. 348, 16 L.R.A. 51, 32 Am. St.

Rep. 460, 31 N. E. 286, holding that in a lease of a completely furnished house for a single season at a summer watering place impliedly warrants that it is fit for habitation without greater preparation than one hiring it for so short a time would be reasonably expected to make; *Wilson v. Finch-Hatton*, L. R. 2 Exch. Div. 336, 46 L. J. Exch. N. S. 489, 36 L. T. N. S. 473, 25 Week. Rep. 537, holding that in a lease of a furnished house there is an implied condition that it shall be fit for occupation at the time the tenancy is to commence.

Cited in 2 *Underhill, Land. & T.* 785, on implied covenant in lease of furnished house for a dwelling as to suitable condition for occupancy.

Implied warranty of continuation of fitness for purpose for which demised.

Cited in *Howard v. Doolittle*, 3 Duer, 464, holding that even where the building is let for a special purpose there is no implied warranty that it will continue fit for that purpose or that it is fit; *New York v. Corlies*, 2 Sandf. 301; *Tennant v. Hall*, 27 N. B. 499,—on the existence of the implied warranty of continuation of fitness for purposes for which demised; *Banks v. White*, 1 Sneed, 613, holding that no warranty results by implication of law, as to continuing condition of property demised by lease; *Watson v. Sarnia Plank Road Co.* 16 U. C. Q. B. 228, holding that there was no implied warranty that leased property should continue fit for the purposes demised.

Unfitness for purpose for which demised as defense to action for rent.

Cited in *Bamford v. Lehigh Zinc & Iron Co.* 33 Fed. 677, holding that where the property was leased for mining purposes upon payment of a royalty of not less than one thousand dollars a year, it was no defense to an action for rent, that no coal existed on the premises; *Gilhooley v. Washington*, 4 N. Y. 217, holding that the unfitness of the premises for use intended is no defense to an action for rent unless the landlord did or aided in creating, the nuisance complained of; *Hess v. Newcomer*, 7 Md. 325; *Graves v. Berdan*, 29 Barb. 100,—on the destruction of the property demised as a defense to an action for rent; *Auer v. Vahl*, 129 Wis. 635, 109 N. W. 529, holding that the breach of the lessor's agreement to make repairs was not a defense to an action for rent; *Wilkin v. Steele*, 14 U. C. Q. B. 570, holding that it was no defense to payment of rent that lessor failed to keep premises in repair in accordance with covenant in lease; *Denison v. Nation*, 21 U. C. Q. B. 57, holding that where the house became untenable because of the roof's leaking, the defendant was liable for rent.

Distinguished in *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322, holding that where the landlord erected a building on the back of the leased premises without the tenant's consent so that part of the building became unfit for the use intended, the rent should be reduced; *Elliott v. Aiken*, 45 N. H. 30, holding that while mere unfitness for purposes leased for was no defense, yet if the lessee surrenders the premises and the lessor accepts, it is a good defense; *Wallace v. Lent*, 29 How. Pr. 289, 1 Daly, 481, holding that where the landlord knows that a cause exists that renders the premises unfit for habitation, the tenant is not bound to pay rent if he vacates as soon as possible; *Jackson v. Odell*, 14 Abb. N. C. 42, 12 Daly, 345, holding that where there was a fraudulent representation as to the condition of the premises, no rent could be collected if the tenant abandoned the premises as soon as possible after discovering the fraud.

What constitutes a lease.

Cited in *Mack v. Patchin*, 29 How. Pr. 20, 1 Sheldon, 67, on the necessity of the words grant and demise to constitute a lease; *Scott v. Scott*, 18 Gratt. 150, on what constitutes a lease.

Liability of landlord for injuries resulting from want of repair of premises.

Cited in *Schwalbach v. Shinkle*, W. & K. Co. 97 Fed. 483, on nonliability of lessor and lessee for unforeseen inevitable accident from condition of premises; *Cole v. McKey*, 66 Wis. 500, 57 Am. Rep. 293, 29 N. W. 279, holding that in the absence of any secret defect, deceit, warranty or agreement on the part of the landlord to repair, he cannot be held liable for an injury resulting from need of repairs to the premises.

9 E. R. C. 460, *GIBSON v. WELLS*, 1 Bos. & P. N. R. 290, 8 Revised Rep. 801, 2 Smith, 677.

Action on the case for permissive waste.

Cited in *Danziger v. Silberthan*, 21 N. Y. Civ. Proc. Rep. 283, as to an action the case lying for permissive waste.

—As against whom it will lie.

Cited in *Newbold v. Brown*, 44 N. J. L. 266, as to an action lying against a tenant from year to year for permissive waste; *Moore v. Townshend*, 33 N. J. L. 284; *Morris v. Cairncross*, 14 Ont. L. Rep. 544,—holding that tenant for years is liable for permissive waste; *Barnes v. Dowling*, 44 L. T. N. S. 809, 45 J. P. 635, 767; *Patterson v. Central Canada Loan & Sav. Co.* 29 Ont. Rep. 134; *Re Cartwright*, L. R. 41 Ch. Div. 532, 58 L. J. Ch. N. S. 590, 60 L. T. N. S. 891, 37 Week. Rep. 612,—on the liability of a tenant for life, for permissive waste; *Parrott v. Barney*, Deady, 405, Fed. Cas. No. 10,773a, holding that tenant at will is not liable for failure to keep premises in repair.

Cited in notes in 9 Eng. Rul. Cas. 467, on liability of tenant from year to year for dilapidations arising in proper use of premises; 15 E. R. C. 314, on implied promise by tenant to properly manage farm.

Cited in 2 Underhill, Land. & T. 720, on nonliability of tenant at will or sufferance for permissive waste.

Explained in *Blackmore v. White* [1899] 1 Q. B. 293, 68 L. J. Q. B. N. S. 180, 80 L. T. N. S. 79, 47 Week. Rep. 448, holding that an action on the case for permissive waste will lie against a tenant at will if there is an express or implied covenant to repair.

9 E. R. C. 463, *HORSEFALL v. MATHER*, Holt. N. P. 7, 17 Revised Rep. 589.

Use of premises by tenant.

Cited in notes in 64 L.R.A. 649, 651, on tenant's duty to leave premises in good condition; 15 E. R. C. 247, on right of assignee to sue covenantor; 15 E. R. C. 555, on effect of custom as to tenant's rights in waygoing crop; 12 E. R. C. 60, on liability of executor or administrator for rent.

—Liability of tenant for waste or repairs.

Cited in *Parrott v. Barney*, Deady, 405, Fed. Cas. No. 10,773a, holding that tenant at will is not liable for failure to keep premises in repair; *Johnson v. Dixon*, 1 Daly, 178, holding that tenant from month to month is under no obligation to make substantial repairs; *Eagle v. Swayze*, 2 Daly, 140, holding that tenant from year to year, renting part of dwelling house, residue of which is occupied by others, is under no obligation to rebuild chimney which has fallen; *Morris v. Cairncross*, 14 Ont. L. Rep. 544, holding that tenant for years is liable for permissive waste.

Cited in 1 Underhill, Land. & T. 138, on nonliability of tenant from year to

year to make substantial and lasting repairs; 1 Washburn, Real Prop. 6th ed. 412, on liability of lessor or lessee for repairs.

What constitutes covenant to repair.

Cited in *Powell v. Dayton*, S. & G. R. Co. 16 Or. 33, 8 Am. St. Rep. 251, 16 Pac. 863; *Williams v. Kearny County*, 61 Kan. 708, 60 Pac. 1046,—holding that implied covenant in lease to use premises was not to cause unnecessary injury, is not covenant to repair generally, but to avoid necessity of repair; *Lovett's Case*, 12 Ct. Cl. 67, holding that implied obligation on part of lessee so to use property as not unnecessarily to injure it, is not covenant to repair.

Liability for destruction of premises during occupancy.

Cited in *Lovett's Case*, 9 Ct. Cl. 479, holding that where tenancy is from year to year by mere occupancy, liability for destruction of building by fire, is not incidental to such mere occupancy.

Implied obligations resulting from relation of landlord and tenant.

Cited in *United States v. Bostwick*, 94 U. S. 53, 24 L. ed. 65, holding that relation of landlord and tenant implies obligation that tenant will exercise reasonable care to prevent damage to property.

Cited in 2 *Underhill, Land. & T.* 730, on implied obligation of tenant to use property so as not to unnecessarily injure it as not being covenant to repair generally, but to use property so as to avoid repairs.

9 E. R. C. 474, *GUTTERIDGE v. MUNYARD*, 7 Car. & P. 129, 1 Moody & R. 334.
Duty of lessee under covenant to repair.

Cited in *Stultz v. Locke*, 47 Md. 562, holding that a covenant to keep premises in good repair means such repair as when they were taken: *Middlekauff v. Smith*, 1 Md. 329, holding same as to covenant in lease for an old mill; *Crawford v. Bugg*, 12 Ont. Rep. 8, on duty of tenant to keep premises as near as possible in the same condition as that in which he received them; *Lister v. Lane* [1893] 2 Q. B. 212, 62 L. J. Q. B. N. S. 583, 69 L. T. N. S. 174, 41 Week. Rep. 626, 9 Eng. Rul. Cas. 478, holding that the lessees were not obliged to rebuild a house where it was destroyed during their term because of inherent defects, though they had covenanted to repair; *Torrens v. Walker* [1906] 2 Ch. 166, 75 L. J. Ch. N. S. 645, 54 Week. Rep. 584, 95 L. T. N. S. 409, on the duty to repair by lessor and the extent to which, under lease, containing covenants for same.

Cited in notes in 64 L.R.A. 652, 654, on tenant's duty to leave premises in good condition; 12 E. R. C. 60, on liability of executor or administrator for rent; 53 L.R.A. 676, on what constitutes damages "by the elements" within meaning of contract stipulations.

Cited in 2 *Underhill, Land. & T.* 885, on construction of a covenant to keep in repair by tenant.

—Extent to which he is bound to repair.

Cited in *Chesapeake Brewing Co. v. Goldberg*, 107 Md. 485, 69 Atl. 37, 15 Ann. Cas. 579, holding that a covenant in a lease for a term to commence in the future, to repair and to surrender them "in as good a condition as they are now," refers to the condition at the beginning of the term; *St. Joseph & St. L. R. Co. v. St. Louis*, I. M. & S. R. Co. 135 Mo. 173, 33 L.R.A. 607, 36 S. W. 602, holding that a covenant to repair merely obligates the lessee to keep them in as good a condition as when they were taken; *Van Wormer v. Crane*, 51 Mich. 363, 47 Am. Rep. 582, 16 N. W. 686; *Miller v. McCordell*, 19 R. I. 364, 30 L.R.A. 682, 33

Atl. 445; *Buck v. Pike*, 27 Vt. 529,—as to the extent the lessee is bound to repair the premises under the covenant.

—As affected by the age and condition of the house when taken.

Cited in *Drouin v. Wilson*, 80 Vt. 335, 67 Atl. 825, 13 Ann. Cas. 93, holding that the age, class, and general condition of the leased property when taken, are to be considered in determining the liability of the tenant under his covenants to repair.

Admissibility of parol evidence to show intention as to repairs to property leased.

Cited in *Chamberlain v. Brown*, 141 Iowa, 540, 120 N. W. 334, holding that parol evidence may be admissible to show manner in which parties understood provisions in written lease in relation to making repairs.

9 E. R. C. 476, *BURDETT v. WITHERS*, 7 Ad. & El. 136, 1 Jur. 514, 6 L. J. K. B. N. S. 217, 2 Nev. & P. 122, W. W. & D. 444.

Extent of liability of tenant for repairs.

Cited in *Watriss v. First Nat. Bank*, 130 Mass. 343, holding that the measure of damages for breach of tenant's covenant to repair is the amount necessary to put the premises in the same condition as when he received them.

Cited in notes in 64 L.R.A. 654, on tenant's duty to leave premises in good condition; 12 E. R. C. 60, on liability of executor or administrator for rent.

Cited in 2 Underhill, Land. & T. 893, on tenant not being entitled to return premises in bad repair because in such state upon demise where he covenants to keep them in good repair.

9 E. R. C. 478, *LISTER v. LANE*, 57 J. P. 725, 62 L. J. Q. B. N. S. 583, 69 L. T. N. S. 176 [1893] 2 Q. B. 212, 4 Reports. 474, 41 Week. Rep. 626.

Duty of tenant to rebuild or repair under covenant to repair.

Cited in *Munroe v. Carlisle*, 176 Mass. 199, 57 N. E. 332, holding that lessor of building which lessee has covenanted to keep in repair, is not liable to person who, while on sidewalk is injured by piece of capstone falling from one of windows; *Drouin v. Wilson*, 80 Vt. 335, 67 Atl. 825, 13 Ann. Cas. 93, holding that age, class, and general condition of leased property when taken are to be considered in determining liability of tenant under his covenants; *Wright v. Lawson*, 19 Times L. R. 510, 68 J. P. 34, holding that where a building had become so dilapidated that it was ordered torn down by the city authorities the lessees were not bound to rebuild under a covenant to repair; *Torrens v. Walker* [1906] 2 Ch. 166, 75 L. J. Ch. N. S. 645, 54 Week. Rep. 584, 95 L. T. N. S. 409, holding that where the building had by natural decay become so dilapidated that it was impossible to repair it, without rebuilding it entirely, the lessees were not bound to rebuild.

Cited in notes in 22 L.R.A. 615, on tenant's rights and liabilities on destruction of leased building; 64 L.R.A. 661, on tenant's duty to leave premises in good condition; 12 E. R. C. 60, on liability of executor or administrator for rent.

Cited in 2 Underhill, Land. & T. 887, on construction of covenant to keep in repair by tenant.

9 E. R. C. 488, *VANE v. BARNARD*, 1 Eq. Cas. Abr. 399, pl. 3, Gilb. Eq. Rep. 127, Prec. in Ch. 454, 2 Vern. 738, 1 Salk. 161.

Jurisdiction of court of equity to restrain waste.

Cited in *Jones v. Britton*, 102 N. C. 166, 4 L.R.A. 178, 9 S. E. 554 (dissenting Notes on E. R. C.—60.

opinion); *Steinmetz v. Witmer*, 1 Pearson (Pa.) 524,—on the jurisdiction of equity to prevent waste.

—To whom injunction will issue.

Cited in *Camp v. Bates*, 11 Conn. 51, 27 Am. Dec. 707, holding that equity will enjoin an insolvent debtor from committing waste upon his estate; *Dougall v. Foster*, 4 Grant, Ch. (U. C.) 319, holding that tenant in common will be restrained at suit of cotenant from digging earth for bricks on joint property.

Cited in notes in 9 Eng. Rul. Cas. 463, on nonliability of tenant at will for permissive waste; 9 Eng. Rul. Cas. 507, on right of tenant in tail after possibility of issue is extinct to commit waste; 25 E. R. C. 48, on relative rights of life tenant and remaindermen to chattel which will be consumed in the use; 25 E. R. C. 369, on right to timber as between life tenant and remainderman.

—Tenants without impeachment of waste.

Cited in *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 205; *Clement v. Wheeler*, 25 N. H. 361,—holding that an injunction will lie to restrain a tenant for life without impeachment of waste, from committing waste which affects the inheritance in an unreasonable manner; *Duncombe v. Belt*, 81 Mich. 332, 45 N. W. 1004, holding same as to one holding in the nature of a tenant in fee; *Wilds v. Layton*, 1 Del. Ch. 226, 12 Am. Dec. 91, holding same as to a tenant holding under writ of elegit.

—At whose suit.

Cited in *Dennett v. Dennett*, 43 N. H. 499, holding that a bill in chancery to restrain waste, lies to any party in remainder whose estate is injured.

—Mandatory injunction to restore.

Cited in *Klie v. Von Broeck*, 56 N. J. Eq. 18, 37 Atl. 469, holding that where a tenant for years committed waste, the court could compel him to restore the premises, by mandatory injunction.

9 E. R. C. 495, *ABRAHAM v. BUBB*, 2 Freem. Ch. 53, 19 Revised Rep. 51, 2 Swanst. 172, note, 2 Shower 69, 2 Eq. Cas. Abr. 757, pl. 1.

Jurisdiction of court of equity to restrain waste by tenant.

Cited in *Duvall v. Waters*, 1 Bland, Ch. 569, 18 Am. Dec. 350, on the jurisdiction of a court of equity to restrain waste by a tenant in tail after possibility of issue extinct; *Duncombe v. Belt*, 81 Mich. 332, 45 N. W. 1004, holding that life tenant will not be permitted to entirely strip land of timber, and convert it into lumber, and sell it away from inheritance.

Cited in notes in 9 Eng. Rul. Cas. 490, on right to restrain life tenant from committing wanton or malicious destruction; 25 E. R. C. 369, 370, on right to timber as between life tenant and remainderman.

What constitutes waste by tenant.

Cited in *Kidd v. Dennison*, 6 Barb. 9, holding that where tenant cuts trees for sake of profit derived from sale of timber, he is guilty of waste.

9 E. R. C. 498, *WILLIAMS v. WILLIAMS*, 12 East, 209, 11 Revised Rep. 357, answering case sent by the Lord Chancellor, 15 Ves. Jr. 419.

Incidents of ownership of property.

Cited in *Mittleberger v. By*, 2 U. C. Q. B. O. S. 379, on the incidents of ownership of property.

Timber as a part of the real estate.

Cited in *Ellis v. Grubb*, 3 U. C. Q. B. O. S. 611, on timber as a part of the real estate until severed therefrom.

Jurisdiction of equity to restrain waste by tenant without impeachment of waste.

The decision of the Court of Chancery was cited in *Jones v. Britton*, 102 N. C. 166, 4 L.R.A. 178, 9 S. E. 554 (dissenting opinion), on the jurisdiction of a court to restrain a tenant for life without impeachment for waste, from committing waste.

Construction of devise for widow.

Cited in *Humberstone v. Thomas*, 3 U. C. Q. B. O. S. 516, as to what estate was granted to a widow by a will.

Removability of farming fixtures.

Cited in 2 *Underhill, Land. & T.* 1258, on farming fixtures as not removable.

Judgment as lien.

The decision of the Court of Chancery was cited in *Chapron v. Cassady*, 3 *Humph.* 661, on equitable recognition of lien of judgment.

9 E. R. C. 508, *HANSON v. DERBY*, 2 *Vern.* 392.

Right of mortgagee in possession to commit waste.

Cited in *Price v. Ward*, 25 *Nev.* 203, 46 L.R.A. 459, 58 *Pac.* 849, on the rights of a mortgagee in possession at common law, to commit waste.

— Jurisdiction of equity to restrain.

Cited in *Knarr v. Conaway*, 42 *Ind.* 260, on the jurisdiction of a court to restrain a mortgagor in possession of the land, from committing waste; *Great Falls Co. v. Worster*, 15 *N. H.* 412, on the jurisdiction of a court to restrain a mortgagee in possession from committing waste and to compel him to deliver up possession if he does; *Youle v. Richards*, 1 *N. J. Eq.* 534, 23 *Am. Dec.* 722, holding that an injunction would be allowed to restrain a mortgagee in possession from committing waste; *Powell v. Webster*, 4 *Rawle*, 242, on the right to restrain a mortgagee in fee from committing waste.

Jurisdiction of equity to direct an accounting and repayment.

Cited in *Miller v. Cotten*, 5 *Ga.* 341, on the jurisdiction of a court of equity to direct an accounting and repayment of benefits unfairly received.

9 E. R. C. 508, *RUSSEL v. SMITHIES*, 1 *Anstr.* 96, 3 *Revised Rep.* 560.

Duty of a mortgagee in possession to repair premises.

Cited in *Clark v. Smith*, 1 *N. J. Eq.* 121, holding that a mortgagee in possession is bound only to make such expenditures for repairs as are absolutely necessary for the protection of the estate.

Cited in notes in 64 L.R.A. 652, on tenant's duty to leave premises in good condition; 18 *Eng. Rul. Cas.* 430, on liability to account of mortgagee entering into possession, for receipt of rents and profits.

Cited in 2 *Washburn, Real Prop.* 6th ed. 213, on duty of mortgagee as to repairs.

9 E. R. C. 510, HUMPHREYS v. HARRISON, 1 Jac. & W. 581, 21 Revised Rep. 238.

Jurisdiction of equity to restrain a mortgagor from committing waste in impairment of security.

Cited in *Beardsley v. Beardsley*, 138 U. S. 252, 34 L. ed. 923, 11 Sup. Ct. Rep. 318; *Williams v. Chicago Exhibit Co.* 86 Ill. App. 167,—on the jurisdiction of a court of equity to restrain a mortgagee in possession from committing waste; *Moriarty v. Ashworth*, 43 Minn. 1, 19 Am. St. Rep. 203, 44 N. W. 531, holding that a court of equity will not interfere to restrain a mortgagor in possession from committing waste, unless it will diminish the security so as to make it of doubtful sufficiency; *Mann v. English*, 38 U. C. Q. B. 240, on the jurisdiction of a court of equity to restrain a mortgagor in possession from doing any act which will diminish the security which is already scant; *Russ v. Mills*, 7 Grant, (Ch. (U. C.)) 145, holding that mortgagor may be restrained from cutting timber for sale, unless he can show that property is sufficient to pay mortgage notwithstanding removal of timber; *Harper v. Aplin*, 54 L. T. N. S. 383, holding that a mortgagee was entitled to an injunction to restrain a mortgagor in possession from cutting trees upon the mortgaged lands when the security was barely sufficient to cover the debt.

Cited in note in 18 Eng. Rul. Cas. 103, on restriction in equity of mortgagor's rights of ownership.

9 E. R. C. 513, LYELL v. KENNEDY, L. R. 8 App. Cas. 217, 52 L. J. Ch. N. S. 385, 48 L. T. N. S. 585, 31 Week. Rep. 618, reversing the decision of the Court of Appeal, reported in L. R. 20 Ch. Div. 484, 51 L. J. Ch. N. S. 409, 46 L. T. N. S. 752, 30 Week. Rep. 493.

Right to maintain bill for discovery.

Cited in *Sloss-Sheffield Steel & I. Co. v. Maryland Casualty Co.* 167 Ala. 557, 52 So. 751, holding that discovery cannot be used as mere pretext for bringing common law action in court of chancery; *Adams v. Cavanaugh*, 37 Hun, 232, holding that the examination for discovery cannot pertain to matters which go only to sustain the case of the person examined; *Von Ferber v. Euright*, 19 Manitoba L. Rep. 383, holding that party is not entitled to discovery of evidence in possession of opposite party which exclusively relates to case of latter; *Leitch v. Grand Trunk R. Co.* 13 Ont. Pr. Rep. 369, on the right to administer interrogatories to an officer of a body corporate upon matters respecting which discovery might lawfully be had.

Cited in notes in 8 Eng. Rul. Cas. 727, 728, on right to production of deeds sustaining one's title to land; 9 E. R. C. 596, 597, on privilege from discovery of documents prepared for obtaining advice of attorney or solicitor; 21 Eng. Rul. Cas. 721, on rights of purchaser for value without notice.

The decision of the Court of Appeal was cited in *Chambers v. Jaffray*, 12 Ont. L. Rep. 377, holding that a defendant in a suit for libel, on his examination for discovery is in the same position as he would be if he were being examined as a witness at a trial; *Leitch v. Grand Trunk R. Co.* 13 Ont. Pr. Rep. 369, holding that test of propriety of allowing officer of company to be examined for discovery is his ability to give necessary information; *Wrentmore v. Hagley*, 46 L. T. N. S. 741, on the jurisdiction of a court to compel a defendant to make an affidavit of documents in his possession; *Daniel v. Ford*, 47 L. T. N. S. 575, holding that the plaintiff in an action in the nature of an ejectment action claiming by a purely

legal title can not obtain discovery from the defendants, unless before the judicature act a bill for discovery in aid of such action would have been sustained.

—Principles governing same.

Cited in *Reynolds v. Burgess Sulphite Fibre Co.* 71 N. H. 332, 57 L.R.A. 949, 93 Am. St. Rep. 535, 51 Atl. 1075, holding that the same principles govern discovery whether it be invoked in aid of other issues involved in suit in equity or in aid of an action at law.

—As affected by the Judicature Act and Rules.

The decision of the Court of Appeal was cited in *Hunnings v. Williamson*, L. R. 10 Q. B. Div. 459, 52 L. J. Q. B. N. S. 273, 48 L. T. N. S. 581, 31 Week. Rep. 336, 47 J. P. 390, holding that there had been no change in the right to discovery by the Judicature Acts; *Roberts v. Oppenheim*, L. R. 26 Ch. Div. 724, 53 L. J. Ch. N. S. 1148, 50 L. T. N. S. 729, 32 Week. Rep. 654; *Bidder v. Bridges*, L. R. 29 Ch. Div. 29, 54 L. J. Ch. N. S. 798, 52 L. T. N. S. 455, 33 Week. Rep. 792, 9 Eng. Rul. Cas. 529,—on the alteration in the right of discovery by the Judicature Rules.

Change in jurisdiction of the English Courts by the Judicature Acts.

The decision of the Court of Appeal was cited in *Companhia de Mocambique v. British South Africa Co.* [1892] 2 Q. B. 358, on the change in the jurisdiction of the English courts by the Judicature Acts and Rules.

Sufficiency of answer to interrogatories.

Cited in *Hannaghan v. Hannaghan*, 1 N. B. Eq. 395, holding that it is not sufficient for plaintiff, in answer to interrogatory, to deny having knowledge, without stating his information and belief.

9 E. R. C. 529, *BIDDER v. BRIDGES*, L. R. 29 Ch. Div. 29, 54 L. J. Ch. N. S. 798, 52 L. T. N. S. 455, 33 Week. Rep. 792, modifying the decision of *Kay*, J., reported in 51 L. T. N. S. 818, 33 Week. Rep. 272.

Principles governing right to discovery.

Cited in *Von Ferber v. Enright*, 19 Manitoba L. Rep. 383, holding that party is not entitled to discovery of evidence in possession of opposite party which exclusively relates to case of latter.

Distinguished in *Elliott v. Hogue*, 3 Manitoba L. Rep. 674, holding in an action upon promissory notes, to which the defense was breach of warranty the plaintiff was entitled to full particulars, as to the loss of profits caused by the breach and other expenses.

9 E. R. C. 555, *RE HINCHLIFFE* [1895] 1 Ch. 117, 64 L. J. Ch. N. S. 76, 71 L. T. N. S. 532, 73 L. T. N. S. 522, 12 Reports, 33, 43 Week. Rep. 82.

Right of defendant to have exhibits attached to affidavits, produced for inspection.

Cited in *Walt v. Barber*, 6 B. C. 461, to the point that when affidavit refers to exhibit, party entitled to see affidavit is entitled to see exhibit also.

Distinguished in *Sloane v. British S. S. Co.* [1897] 1 Q. B. 185, 66 L. J. Q. B. N. S. 72, 75 L. T. N. S. 542, 45 Week. Rep. 203, holding that a plaintiff suing in forma pauperis can not be ordered to produce for inspection by the defendant, the case laid before counsel and his opinion thereon even where they have been made exhibits and attached to an affidavit and filed.

Exhibit as part of the affidavit to which attached.

Cited in *Carter v. Roberts* [1903] 2 Ch. 312, 72 L. J. Ch. N. S. 655, 89 L. T.

N. S. 239, 51 Week. Rep. 520, on an exhibit as a part of the affidavit to which attached.

Necessity of filing exhibits referred to in affidavit.

Cited in *Lassen v. Bauer*, 5 Terr. L. R. 458, holding that it is not necessary to file exhibits referred to in affidavit filed on application in chambers.

9 E. R. C. 561, *ELDER v. CARTER*, 54 J. P. 692, 59 L. J. Q. B. N. S. 281, 62 L. T. N. S. 516, L. R. 25 Q. B. Div. 194, 38 Week. Rep. 612.

Order to produce documents.

Cited in *Ryder v. Bateman*, 93 Fed. 31, holding that parties are only required to produce documents upon bill of discovery or upon motion to produce; *Burehard v. Macfarlane* [1891] 2 Q. B. 241, 60 L. J. Q. B. N. S. 587, 65 L. T. N. S. 282, 39 Week. Rep. 694, 7 Asp. Mar. L. Cas. 93, on the rules governing the production of documents.

— Against persons not parties to the proceedings.

Cited in *Re Smith* [1891] 1 Ch. 323, 60 L. J. Ch. N. S. 328, 64 L. T. N. S. 253, on the right to compel a third party to produce documents which are necessary to the hearing or to the carrying out of a previous order; *O'Shea v. Wood* [1891] P. 286, 60 L. J. Prob. N. S. 83, 65 L. T. N. S. 30, holding that an order to produce documents could not be issued against the solicitor of the plaintiff who for many years had acted as solicitor for the testatrix, where the documents were his own private property.

9 E. R. C. 570, *HENNESSY v. WRIGHT*, 53 J. P. 52, 57 L. J. Q. B. N. S. 530, 59 L. T. N. S. 323, L. R. 21 Q. B. Div. 509.

Jurisdiction of court to compel a public official to produce public documents.

Cited in *Wright v. Mills*, 62 L. T. N. S. 558, holding that a court had no jurisdiction to order a public official to produce copies of public documents in his possession which it was for the best of the public service not to produce; *Re Hargreaves* [1900] 1 Ch. 347, 69 L. J. Ch. N. S. 183, 48 Week. Rep. 241, 82 L. T. N. S. 132, 16 Times L. R. 155, 7 Manson, 354, on the right to compel a government official to produce documents in his possession.

Cited in note in 5 L.R.A.(N.S.) 167, on report by executive or administrative officer as privileged.

— To compel disclosure of name of informer in action against public officer.

Cited in *Humphrey v. Archibald*, 21 Ont. Rep. 553, holding that disclosure of name of informer, in action for malicious prosecution against police officer, should not be made except where material to issue.

9 E. R. C. 587, *SOUTHWARK & V. WATER CO. v. QUICK*, 47 L. J. Q. B. N. S. 258, 38 L. T. N. S. 28, L. R. 3 Q. B. Div. 315, 26 Week. Rep. 341.

Documents prepared for purposes of litigation as being privileged from production.

Cited in *Elmsley v. Miller*, 10 Ont. L. Rep. 343, holding that documents obtained by solicitor to aid plaintiff in forming opinion as to legal rights in reference to road in dispute are privileged from production in action brought as result of opinion of solicitor; *The Theodor Korner*, L. R. 3 Prob. Div. 162, 47 L. J. Prob. N. S. 85, 38 L. T. N. S. 818, 27 Week. Rep. 307, holding that the defendant in an

action of damages to cargo is not entitled to obtain from the plaintiff, inspection of reports of surveys prepared solely for the purposes of the action.

Distinguished in *Ainsworth v. Wilding* [1900] 2 Ch. 315, 69 L. J. Ch. N. S. 695, holding that mere records of what takes place in chambers in the course of a hostile litigation in the presence of parties of both sides are not privileged from production.

— Shorthand notes of testimony.

Cited in *Nordon v. Defries*, L. R. 8 Q. B. Div. 508, 51 L. J. Q. B. N. S. 415, 30 Week. Rep. 612, 46 J. P. 566, holding that shorthand notes taken during a trial for the purpose of using them in a second action against other persons, are privileged and can not be ordered produced; *Learoyd v. Halifax Joint Stock Bkg. Co.* [1893] 1 Ch. 686, 62 L. J. Ch. N. S. 509, 3 Reports, 252, 68 L. T. N. S. 158, 41 Week. Rep. 344, holding that stenographer's notes taken at an examination of witnesses upon the application of a trustee in bankruptcy to enable the solicitor to advise as to bringing an action concerning the bankrupt's affairs, are privileged from production.

— Submitted to solicitor for professional opinion thereon.

Cited in *Edison Electric Light Co. v. United States Electric Lighting Co.* 44 Fed. 294, holding that party cannot excuse nonproduction of documents called for by showing that he delivered them to his counsel; *Savage v. Canadian P. R. Co.* 16 Manitoba L. Rep. 381, holding that reports of the officials of the railroad company made before the company had notice of the litigation, are not privileged though headed "For the information of the solicitor of the company and his advice thereon;" *Beale v. Toronto*, 16 Ont. Pr. Rep. 386, note, on the reports submitted to a solicitor for his professional opinion as being privileged from production.

Production of reports of employees on railroad accident.

Cited in *Savage v. Canadian P. R. Co.* 15 Manitoba, L. Rep. 401; *Feigleman v. Montreal Street R. Co.* 3 D. L. R. 125,—holding that company examined on discovery by plaintiff in railroad accident, will be compelled to produce and file report of accident made by company's employees.

— Of letters between different offices of insurance company.

Cited in *Thomson v. Maryland Casualty Co.* 11 Ont. L. Rep. 44, holding that letters between local and head office of insurance company are not privileged, unless they came into existence for purpose of being communicated to solicitor in relation to suit.

Communications between attorney and client as privileged.

Cited in *Re Ruos*, 159 Fed. 252, on what communications between attorney and client are privileged.

Communications between co-plaintiffs relative to advice of counsel as privileged.

Cited in *Imrie v. Wilson*, 2 D. L. R. 886, holding that letters from one plaintiff to another might be withheld under order to produce them upon ground of privilege where they were confidential and related to advice of counsel.

Disclosures by officers of corporations.

Cited in *Gunn v. New York, N. H. & H. R. Co.* 171 Mass. 417, 50 N. E. 1031, to the point that directors of company, in answering interrogatories for company, must get such information as they can from other servants of company; *Nichols & S. Co. v. Skedanuk*, 6 D. L. R. 115, holding that one who is examined for discovery as officer of corporation, must obtain information from employees, or

must show reason for not doing so; *Clarkson v. Bank of Hamilton*, 9 Ont. L. Rep. 317, holding that corporation should suggest officer or servant best qualified to give information desired, under order for discovery; *Canadian P. R. Co. v. Conmee*, 11 Ont. Pr. Rep. 297, on the information derived through privileged communications as being privileged from disclosure; *Harris v. Toronto Electric Light Co.* 18 Ont. Pr. Rep. 285, on the duty of the directors of a corporation in answering interrogatories to obtain information from other parties who are servants of the corporation.

9 E. R. C. 601, *DUNK v. HUNTER*, 5 Barn. & Ald. 322, 24 Revised Rep. 390.
Necessity of a demise for a fixed rent to entitle party to distrain for rent.

Cited in *Scruggs v. Gibson*, 40 Ga. 511 (dissenting opinion), on the necessity of the existence of an actual demise for a fixed sum to entitle a person to distrain for rent; *Moulton v. Norton*, 5 Barb. 286, holding that a conditional contract and an election by the tenant without alleging any specific demise, was not sufficient in an action for distress for rent; *Mitchell v. McDuffy*, 31 U. C. C. P. 266, holding that where there was no fixed rent agreed upon there can be no distress for rent.

Cited in *Smith, Pers. Prop.* 311, on remedy by distress for collection of rent.
What constitutes a lease.

Cited in *Mercer v. Mercer*, 12 Ga. 421, on a contract as being implied from the title of the plaintiff and the occupation of the defendant; *Brougham v. Balfour*, 3 U. C. C. P. 72, on what constituted a lease.

— **Agreement for lease in futuro.**

Cited in *Boston, C. & M. R. Co. v. Boston & L. R. Co.* 65 N. H. 393, 23 Atl. 529 (dissenting opinion), on the question whether a written instrument is a lease or simply an agreement for one; *M'Lean v. Young*, 1 N. C. C. P. 62, holding that an agreement to sign a lease as soon as the same could be drawn up, on certain terms was simply an agreement to lease and not a lease.

Party in possession of land under incomplete agreement to lease, as a tenant at will.

Cited in *Williams v. Cash*, 27 Ga. 507, 73 Am. Dec. 739, on a party as a tenant at will who has gone into possession of land under an uncompleted contract to lease; *Love v. Edmondston*, 23 N. C. (1 Ired. L.) 152, holding that a party who has been let into possession of land under a contract for the letting of the same which has not been completed, is a tenant at will.

9 E. R. C. 605, *MECHELEN v. WALLACE*, 7 Ad. & El. 54 note, 6 L. J. K. B. N. S. 217, 6 Nev. & M. 316, 2 Nev. & P. 224.

Distress for rent.

Distinguished in *Davis v. George*, 67 N. H. 393, 39 Atl. 979, holding that a clause in a lease relieving the lessee from his agreement to deliver up the house at the end of his term if it should be destroyed by inevitable accident, does not relieve him from payment of rent if it is.

Separating parts of an entire contract.

Cited in *Prost v. More*, 40 Cal. 347, holding that an entire contract void in part is entirely void; *Rand v. Mother*, 11 Cush. 1, 59 Am. Dec. 131, on a contract void in part under the statute of frauds as being void in toto; *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619, holding that a contract partially within the statute is wholly within it if it is an entire contract; *Combs v. Bateman*, 10

Barb. 573, holding a contract which was within the statute of frauds void, if the contract was entire and it was not all in writing.

Cited in Browne, Stat. Frauds, 5th ed. 181, on validity of contracts partly within statute of frauds; Browne Stat. Frauds, 5th ed. 143, on enforceability of contract when parts within statute of frauds have been executed; Browne, Stat. Frauds, 5th ed. 330, on applicability of statute of frauds to sale of growing crops.

9 E. R. C. 610, *BROWN v. METROPOLITAN COUNTIES LIFE ASSUR. SOC.*
1 El. & El. 832, 5 Jur. N. S. 1028, 28 L. J. Q. B. N. S. 236.

Privity of estate to support distraining for rent.

Cited in *Dauphinais v. Clark*, 3 Manitoba L. Rep. 225, holding that the privity of estate being once destroyed there can be no distress for rent either by the original landlord or his grantee; *Trust & Loan Co. v. Lawrason*, 45 U. C. Q. B. 176, on the powers of distress of landlords.

—Tenancy created by mortgage.

Cited in *Trust & Loan Co. v. Lawrason*, 10 Can. S. C. 679 (affirming 6 Ont. App. Rep. 286), on a tenancy with right to distrain for rent as being created by a mortgage; *Trust & Loan Co. v. Lawrason*, 6 Ont. App. Rep. 286 (dissenting opinion); *Royal Canadian Bank v. Kelly*, 19 U. C. C. P. 196,—on the right to distrain the goods of some third party who was in possession of the land or of the mortgagor whose tenancy had been terminated.

License to enter as being assignable.

Cited in *Ex parte Rawlings*, L. R. 22 Q. B. Div. 193, 37 Week. Rep. 203, holding that license to enter and take goods was not capable of being assigned.

9 E. R. C. 615, *SMITH v. MAPLEBACK*, 1 Revised Rep. 247, 1 T. R. 441.

Distraining for rent.

Cited in *Hope v. White*, 18 U. C. C. P. 430, on the right to distrain for rent seek reserved out a chattel interest.

—Necessity of ownership of reversion.

Cited in *Prescott v. De Forest*, 16 Johns. 159, holding that a lessor having no reversionary interest can not distrain for rent in arrears; *Lynett v. Parkinson*, 1 U. C. C. P. 95, holding that to entitle a party to distrain for rent in arrears he must be entitled to a reversion; *Hope v. White*, 18 U. C. C. P. 430, on the right of a landlord who has no reversion to distrain for rent.

Surrender.

Cited in *Hatcher v. Hatcher*, 2 McMull. L. 429 (dissenting opinion), as to whether a certain agreement operated as a surrender of a life estate; *Brass v. Hardy*, 9 U. C. C. P. 120, holding that an agreement to demise certain lands for all her term upon a certain consideration, to the remainderman operated as a surrender to the latter.

Cited in 2 *Underhill*, Land & T. 1197, on sufficient surrender by a writing that "lessee is content that lessor shall have the land."

Release by covenant not to sue.

Cited in *Chambers v. McDowell*, 4 Ga. 185, holding that if a plaintiff take collateral security for his judgment it does not release his judgment; *Parker v. Holmes*, 4 N. H. 97, on a contract not to sue, as a release; *Durrell v. Wendell*, 8 N. H. 369, holding that a covenant not to sue one of several joint obligors will not operate as a release of the others; *Ferson v. Sanger*, 1 Woodb. & M. 138.

Fed. Cas. No. 4,752, holding same as to joint signers of a note; *Batchelder v. Nutting*, 16 N. H. 265, on a covenant not to sue another upon a particular contract as a release; *Watson v. Randall*, 20 Wend. 201, on a covenant never to sue a sole covenantor or promisor, as a release; *Culp v. Fisher*, 1 Watts, 494, on a certain agreement not to collect money under a mortgage, and secured by certain land, as a release.

Cited in 1 *Beach, Contr.* 568, on covenant not to sue as equivalent to a release; 1 *Beach, Contr.* 569, on effect of covenant not to sue for a definite time.

Avoidance of circuity of action.

Cited in *Crane v. Alling*, 15 N. J. L. 423, on a covenant not to sue as being construed as a release to avoid circuity of actions; *Jackson ex dem. Varick v. Waldron*, 13 Wend. 178; *Newland v. Baker*, 21 Wend. 264,—on the avoidance of circuity of action.

Assignment of lease.

Cited in *Stewart v. Long Island R. Co.* 102 N. Y. 601, 55 Am. Rep. 844, 8 N. E. 200, on the effect of an assignment of a lease.

Cited in note in 15 *Eng. Rul. Cas.* 501, on demise of entire term by lessee as an assignment of the term.

Cited in 1 *Washburn, Real Prop.* 6th ed. 417, on difference between assignment and sublease.

Construction of contracts.

Cited in *Lippincott v. Tilton*, 14 N. J. L. 361, on the construction of contracts according to the intention of the parties.

Jurisdiction of equity.

Cited in *Jewett v. Cumard*, 3 Woodb. & M. 277, Fed. Cas. No. 7,310, on the jurisdiction of a court of equity to compel an accounting of rents and profits of land held as security for debt.

9 E. R. C. 623, *PULLEN v. PALMER*, 3 Salk. 207.

Distress for rent.

Cited in *Smith, Pers. Prop.* 313, on remedy by distress for collection of rent.

9 E. R. C. 624, *WHITLEY v. ROBERTS*, M'Clel. & Y. 107, 25 Revised Rep. 755.

Distraint for rent by tenants in common.

Cited in *Smith v. Wiley*, 22 Ala. 396, 58 Am. Dec. 262, on the necessity of tenants in common, distraining for rent, separately for each one's own share.

Cited in *Smith, Pers. Prop.* 313, on remedy by distress for collection of rent.

Summary proceedings by tenant in common.

Cited in *State, Mullone, Prosecutor v. Klein*, 55 N. J. L. 479, 27 Atl. 902, holding that under statute one joint tenant or tenant in common named as landlord in lease may institute summary proceedings for removal of tenant for nonpayment of rent.

When trover lies.

Cited in *Corbett v. Shepard*, 4 U. C. C. P. 43, to the point that if whole property arises from possession trover will not lie.

9 E. R. C. 634, *WOOD v. TATE*, 2 Bos. & P. N. R. 247, 9 Revised Rep. 645.

Demise for a term of years by a corporation, not bearing corporate seal.

Cited in *Ecclesiastical Comrs. v. Merral*, L. R. 4 Exch. 162, 38 L. J. Exch.

N. S. 93, 20 L. T. N. S. 573, 17 Week. Rep. 676, holding that one who enters upon, occupies and pays rent for corporate property under a demise for a term of years, made on behalf of the corporation, but not sealed with its seal, becomes a tenant from year to year of the corporation, upon the terms.

Distinguished in *Kidderminster v. Hardwick*, L. R. 9 Exch. 13, 22 Week. Rep. 160, 43 L. J. Exch. N. S. 9, 29 L. T. N. S. 610, holding that where there had been no part performance of a contract so that one party had received a benefit, there could be no specific performance of the contract to which the corporate seal had not been attached.

Liability of lessee of corporation for rents reserved under void lease.

Cited in *Kingston & B. Road Co. v. Campbell*, 20 Can. S. C. 605; *Finlayson v. Elliott*, 21 Grant, Ch. (U. C.) 325,—holding that lessee of corporation is liable for rents reserved under void lease during time which he holds.

Liability of corporation for acts of agent.

Cited in *Bank of Upper Canada v. Widmer*, 2 U. C. Jur. 275, to the point that agent of corporation, acting by verbal direction of committee, may render corporation liable in trover.

Void lease as evidence of value of rents.

Cited in *Wilson v. Trustees of No. 16*, 8 Ohio, 175, holding that writing though void as lease may be given in evidence to show value of rents.

9 E. R. C. 643, *GRAY v. STAIT*, 48 J. P. 86, 52 L. J. Q. B. N. S. 412, 49 L. T. N. S. 288, L. R. 11 Q. B. Div. 668, 31 Week. Rep. 662.

Seizure of goods fraudulently removed under distress.

Cited in *Clark v. Green*, 37 N. B. 525, holding that goods fraudulently removed to avoid distress cannot be seized under distress if there is no rent in arrear.

9 E. R. C. 651, *SIMPSON v. HARTOPP*, 1 Smith, Lead. Cas. 11th ed. 437, Willes, 512.

Property privileged from distress for rent.

Cited in *Mack v. Parks*, 8 Gray, 517, 69 Am. Dec. 267; *Cilley v. Jenness*, 2 N. H. 87,—on property exempt from distress for rent as being exempt from attachment.

Cited in note in 9 Eng. Rul. Cas. 669, 674, 675, on what may be distrained for rent.

Distinguished in *Lenoir v. Weeks*, 20 Ga. 596, holding that even though the books of a lawyer may be exempt from distress for rent, they are not from seizure under *fieri facias*.

—Things annexed to the freehold.

Cited in *Alway v. Anderson*, 5 U. C. Q. B. 34, holding that hop poles left standing in the ground after the hops had been picked were not distrainable for rent.

—Things bailed to one to be managed in the way of his trade or profession.

Cited in *Owen v. Boyle*, 22 Me. 47, holding that salt stored in a warehouse awaiting reshipment, with all duties and charges paid was not subject to distress for rent due for rent of warehouse; *McCreery v. Claffin*, 37 Md. 435, holding that the goods of the principal in the store of a commission merchant for sale

are not subject to distress for rent due from the merchant; *Wanamaker & Brown v. Carter*, 22 Pa. Super. 625, holding that goods in a tenant's possession for sale on commission are not subject to distress for rent where landlord had notice that tenant was agent for someone else; *Connah v. Hale*, 23 Wend. 462, holding that goods deposited with another as bailee, awaiting an opportunity to sell are privileged from distress for rent owing by the bailee; *Guy v. Rankin*, 23 N. B. 49, holding that logs delivered to a mill owner in the way of his trade, to be sawed for remuneration are privileged from distress for rent, unless the tenant is joint owner of the logs; *Bent v. McDougall*, 14 N. S. 468, as to what is meant by a public trade so as to make goods privileged from distress for rent.

Distinguished in *Clark v. Millwall Dock Co.* L. R. 17 Q. B. Div. 494, 55 L. J. Q. B. N. S. 378, 54 L. T. N. S. 814, 34 Week. Rep. 695, 9 Eng. Rul. Cas. 655, holding that a ship being manufactured on the premises was subject to distress for rent as it had not been delivered to the tenant to be wrought, worked upon, etc.; *Challoner v. Robinson* [1907] W. N. 217, holding that pictures sent for display in an art exhibit were not sent to be managed in a public trade so as to be privileged from distress for rent.

— Instruments of trade or profession.

Cited in *Trieber v. Knabe*, 12 Md. 491, 71 Am. Dec. 607, holding that a piano belonging to a stranger and rented to a music teacher who was boarding at the hotel, was subject to distress for rent due the landlord, there not being a sufficiency of other goods on the premises.

— Sheaves of corn.

Cited in *Given v. Blann*, 3 Blackf. 64, holding that sheaves and shocks of wheat are exempt from distress for rent.

— Domestic animals.

Cited in *Dustin v. Cowdry*, 23 Vt. 631, on the right to distrain for rent, any animal or other article in the personal use of the debtor.

Trover for wrongful distress.

Cited in *Connah v. Hale*, 23 Wend. 462, holding that trover will lie for wrongful distress.

Distress for rent where no possession taken under execution.

Cited in *Newell v. Clark*, 46 N. J. L. 363, holding that when sheriff did not take possession of goods of tenant on an execution, but left them on the premises, they were subject to distress for rent.

9 E. R. C. 655, *CLARKE v. MILLWALL DOCK CO.* 51 J. P. 5, 55 L. J. Q. B. N. S. 378, 54 L. T. N. S. 814, L. R. 17 Q. B. Div. 494, 34 Week. Rep. 695.

9 E. R. C. 678, *RE ROSS*, 41 L. J. Ch. N. S. 130, L. R. 13 Eq. 286, 25 L. T. N. S. 817, 20 Week. Rep. 231.

Distribution per capita or per stirpes.

Cited in *Davis v. Vanderveer*, 23 N. J. Eq. 558, holding collateral relations cannot take by representation, except in the case of the children of a deceased brother or sister of the intestate; *Wagner v. Sharp*, 33 N. J. Eq. 520, holding where all of the kin are children of brothers and sisters they take per capita.

9 E. R. C. 689, *WHICKER v. HUME*, 7 H. L. Cas. 124, 4 Jur. N. S. 933, 28 L. J. Ch. N. S. 396, 6 Week. Rep. 813, affirming the decision of the Court of Appeal, reported in 1 De G. M. & G. 506, 16 Jur. 391, 21 L. J. Ch. N. S. 406, which affirms the decision of the Master of the Rolls, reported in 14 Beav. 509.

Domicil.

Cited in *Cruger v. Phelps*, 21 Misc. 252, 47 N. Y. Supp. 61, to the point that length of time that person resides in place, is ingredient in determining question of domicil; *Dupuy v. Wurtz*, 53 N. Y. 556, holding that long continued change of residence is strong evidence of intent to change domicil; but alone, will not effect change; *Overby v. Gordon*, 13 App. D. C. 392 (dissenting opinion), as to what constitutes; *Schmoll v. Schenck*, 40 Ind. App. 581, 82 N. E. 805; *Campbell v. White*, 22 Mich. 178; *Magurn v. Magurn*, 3 Ont. Rep. 570; *Re Fraser*, 30 N. S. 272,—on distinction between residence and domicil; *Re Patience*, L. R. 29 Ch. Div. 976, 58 L. J. Ch. N. S. 897, 52 L. T. N. S. 687, 33 Week. Rep. 501; *Crookenden v. Fuller*, 29 L. J. Prob. N. S. 1, 1 Swabey & T. 441, 5 Jur. N. S. 1222, 1 L. T. N. S. 70, 8 Week. Rep. 49; *Drevon v. Drevon*, 34 L. J. Ch. N. S. 129, 4 New Reports, 316, 10 Jur. N. S. 717, 10 L. T. N. S. 730, 12 Week. Rep. 946; *Winans v. Atty.-Gen.* [1904] A. C. 287, 73 L. J. K. B. N. S. 613, 90 L. T. N. S. 721, 20 Times L. R. 510,—holding the domicil of origin continues unless a fixed and settled intention of abandoning it and acquiring another is clearly shown.

—As controlling probate or distribution of estate.

Cited in *Babcock v. Collins*, 60 Minn. 73, 51 Am. St. Rep. 503, 61 N. W. 1020, as to law of foreign domicil controlling disposition of personal property; *Pepper's Estate*, 27 W. N. C. 513, 9 Pa. Co. Ct. 507, 48 Phila. Leg. Int. 96, holding a will disposing of real estate situate in this state, is entitled to be proved and registered here, irrespective of question of domicil; *De Noon's Estate*, 3 Cal. Prob. Dec. 352, holding that statement by testator in his will that he is resident of certain place may be conclusive on that question.

Charitable gifts.

Cited in *Dickson v. United States*, 125 Mass. 311, 28 Am. Rep. 230, as containing reference to a case wherein validity of bequest for the Smithsonian Institution was upheld; *United States v. World's Columbian Exposition*, 56 Fed. 630, holding act of Congress by which it donated \$2,500,000 to the World's Columbian Exposition upon condition that if the gift were accepted the exposition should be closed on Sundays, constituted a charitable gift upon condition; *Hinckley's Estate*, 58 Cal. 457, holding trust in favor of "human beneficence" and "charity" valid; *Saltonstall v. Sanders*, 11 Allen, 446, holding a bequest for "objects and purposes of benevolence or charity" valid charitable bequest; *Goodale v. Mooney*, 60 N. H. 528, 49 Am. Rep. 334, holding "I place the remainder of my property in the hands of my executors, to be distributed by them after my decease, among my relatives, and for benevolent objects, in such sums as in their judgment shall be for the best," a valid bequest in trust; *Re Cunningham*, 206 N. Y. 601, 100 N. E. 437, holding that bequest to executors sum of money to be by them applied in their best judgment to such charitable associations as they may select, is valid; *Pell v. Mercer*, 14 R. I. 412, holding a bequest of personalty in trust for such works of religion or benevolence as the executors of the will may select is a good gift of charitable uses when it appears from the will that benevolence is used in the legal sense of charity; *Gillies v. McConochie*, 3 Ont. Rep. 203, holding bequest to "pious poor converted Jews" a good charitable bequest; *Re*

Macduff [1896] 2 Ch. 451, 65 L. J. Ch. N. S. 700, 74 L. T. N. S. 706, 45 Week. Rep. 154, holding bequest "for some one or more purposes, charitable or philanthropic" is not a good charitable gift.

Cited in note in 5 Eng. Rul. Cas. 573, on invalidity of charitable bequest for indebtedness.

Distinguished in *Beaumont v. Oliviera*, L. R. 6 Eq. 534, L. R. 4 Ch. 309, 38 L. J. Ch. N. S. 329, 20 L. T. N. S. 53, 17 Week. Rep. 269, holding a bequest of pure personalty to the Royal Society, or to the Royal Geographical Society or to the Royal Humane Society, is a charitable legacy.

The decision of the Court of Appeal was cited in *Swasey v. American Bible Soc.* 57 Me. 523; *Cresson v. Cresson*, 5 Clark (Pa.) 431, Fed. Cas. No. 3,389,—holding that devise for home for aged, infirm or invalid gentlemen and merchants, was valid; *Drew v. Wakefield*, 54 Me. 291, holding that, although trust for charitable uses may be somewhat vague and indefinite, court of equity may enforce its execution.

The decision of the Master of Rolls was cited in *Everett v. Carr*, 59 Me. 325, holding a bequest of certain specific sums to several persons named "in trust, to be used purely and solely for charitable purposes,—for the greatest relief of human suffering" etc., a valid bequest for charitable uses.

—For education and propagation of doctrines.

Cited in *Simpson v. Welcome*, 72 Me. 496, 39 Am. Rep. 349, holding trust for purchase and distribution of such religious books or readings as trustees shall deem best, valid charitable trust; *Drury v. Natick*, 10 Allen, 169, holding bequest for establishing a free public library a valid charitable trust; *Jackson v. Phillips*, 14 Allen, 539, holding a bequest to trustees, to be expended at their discretion for purpose of circulation of books and papers, etc., and such other means as in their judgment will create a public sentiment hostile to slavery, a legal charity before abolition of slavery; *Russell v. Allen*, 107 U. S. 163, 27 L. ed. 397, 2 Sup. Ct. Rep. 327; *People ex rel. Ellert v. Cogswell*, 113 Cal. 129, 35 L.R.A. 269, 45 Pac. 270; *Sears v. Chapman*, 158 Mass. 400, 35 Am. St. Rep. 502, 33 N. E. 604,—holding trust for educational purposes a good charitable trust; *Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414, holding a devise of property to provide for use of the public botanical garden, etc., and for establishment of school of botany, created a valid charitable trust; *Glover v. Baker*, 76 N. H. 393, 83 Atl. 916, holding that devise of residuum of estate to religious society, in trust for purpose of keeping certain church buildings in repair and promoting Christian Science, is not void for indefiniteness; *Montreal v. Montreal Auxiliary Bible Soc.* Rap. Jud. Quebec, 6 B. R. 251, holding that gifts for advancement, spread and teaching of religion, are charitable gifts.

The decision of the court of appeal was cited in *McDonough v. Murdock*, 15 How. 367, 14 L. ed. 732, as to validity of bequest for educational purposes.

Cited in note in 14 L.R.A.(N.S.) 98-137, on enforcement of general bequest for charity or religion.

Costs in contest of will.

The decision of the Master of the Rolls was cited in *Anderson v. Dougall*, 13 Grant, Ch. (U. C.) 164, as to the taxation of costs; *Phelps v. Lord*, 25 Ont. Rep. 259, directing the costs of both parties to be paid out of estate.

Application of laws of mother country to colonial possessions.

Cited in *Sinclair v. Mulligan*, 5 Manitoba L. Rep. 17, holding ordinances of Assiniboia were limited to regulating the proceedings of the court and did

not introduce the general laws of England; *Merchants' Bank v. Mulvey*, 6 Manitoba L. Rep. 467, holding English statute enabling indorsees of notes to sue maker or indorser part of law of Manitoba; *Watts v. Watts* [1908] Can. App. Cas. 511; *Watt v. Watt*, 13 B. C. 281,—holding the Imperial Divorce and Matrimonial Causes Act is not in force in British Columbia; *Lyster v. Kirkpatrick*, 26 U. C. Q. B. 217, as to whether statute of uses extends to colonies; *Whitby v. Liscombe*, 23 Grant, Ch. (U. C.) 1, on mortmain act of England (Stat. 9 Geo. II, ch. 36), not being in force in province of Ontario; *Keewatin Power Co. v. Kenora*, 13 Ont. L. Rep. 237, as to effect of phrase "so far as such laws can be applied" in English statutes to not bringing the statute into force in colonies; *Thurburn v. Stewart*, L. R. 3 P. C. 478, 40 L. J. P. C. N. S. 5, 7 Moore, P. C. N. S. 333, 19 Week. Rep. 678, holding Colonial Insolvency Act did not apply to Cape of Good Hope.

Disapproved in *Ferguson v. Gibson*, 22 Grant, Ch. (U. C.) 36; *Hallock v. Wilson*, 7 U. C. C. P. 28,—holding English Statute of Uses in force in Upper Canada.

The decision of the Court of Appeal was cited in *Fish v. Stanton*, 12 C. L. R. (Austr.) 39, to the point that English Act relating to wagering contracts, is to be considered to be in force so far as it can be reasonably applied.

—Mortmain acts.

Cited in *Dodge v. Williams*, 46 Wis. 70, 50 N. W. 1103, holding the English Statutes of Mortmain did not extend to the English colonies in America, and have never been in force in Wisconsin; *Re Pearse*, 10 B. C. 280; *Ray v. Annual Conference*, 6 Can. S. C. 308; *Doe ex dem. Hazen v. St. James' Church*, 18 N. B. 479,—holding statute of mortmain not in force in the province; *Mercer v. Hewston*, 9 U. C. C. P. 349, as to whether statute of mortmain was in force in colonies; *Canterbury v. Wyburn* [1895] A. C. 89, 64 L. J. P. C. N. S. 36, 11 Reports, 331, 71 L. T. N. S. 554, 43 Week. Rep. 430, holding English Statute of Mortmain did not apply to gift of money by colonial will to be invested in land in England; *Jex v. McKinney*, L. R. 14 App. Cas. 77, 58 L. J. P. C. N. S. 67, 60 L. T. N. S. 287, 37 Week. Rep. 577, holding Mortmain Act had not been introduced in British Honduras.

Distinguished in *Whitby v. Liscombe*, 23 Grant, Ch. (U. C.) 1, holding English Statute of Mortmain is in force in Ontario.

Conclusiveness of decree of probate.

Cited in *Simpson v. Stewart*, 10 Manitoba L. Rep. 176, holding it conclusive that the instrument proved is testamentary; *McPherson v. Irvine*, 26 Ont. Rep. 438, as to of what conclusive.

—As to domicile.

Cited in *Bradford v. Young*, L. R. 26 Ch. Div. 656, 54 L. J. Ch. N. S. 96, 50 L. T. N. S. 707, 32 Week. Rep. 901; *Coneha v. Coneha*, L. R. 11 App. Cas. 541, 55 L. T. N. S. 522, 56 L. J. Ch. N. S. 257, 35 Week. Rep. 477, 11 Eng. Rul. Cas. 22, affirming L. R. 29 Ch. Div. 268, 54 L. J. Ch. N. S. 532, 52 L. T. N. S. 282, 33 Week. Rep. 846, 49 J. P. 548,—holding decree of Probate Court not conclusive as to domicile, because the finding as to the domicile was not necessary to the decree.

Eleemosynary institutions.

Cited in *Hale v. Stimson*, 198 Mo. 134, 95 S. W. 885, as to what constitutes.

9 E. R. C. 714, *DOLPHIN v. ROBINS*, 7 H. L. Cas. 390, 5 Jur. N. S. 1271, 29 L. J. Prob. N. S. 11, 3 Macq. H. L. Cas. 563, 7 Week. Rep. 674.

Domicil of married woman.

Cited in *Re Wickes*, 128 Cal. 270, 49 L.R.A. 138, 60 Pac. 867; *Harvey v. Farnie*, L. R. 8 App. Cas. 43, 52 L. J. Prob. N. S. 33, 48 L. T. N. S. 273, 31 Week. Rep. 433, 5 Eng. Rul. Cas. 703,—holding married woman takes domicil of husband.

—Foreign divorce.

Cited in *Magurn v. Magurn*, 3 Ont. Rep. 570; *Le Mesurier v. Le Mesurier* [1895] A. C. 517, 64 L. J. P. C. N. S. 97, 72 L. T. N. S. 873, 11 Reports, 527,—holding a so-called “matrimonial domicil,” said to be created by a bona fide residence of the spouses within the territory, of a less degree of permanence than is required to fix their true domicil, cannot be recognized as creating jurisdiction in action for divorce; *Le Sueur v. Le Sueur*, L. R. 1 Prob. Div. 139, 45 L. J. Prob. N. S. 73, 34 L. T. N. S. 511, 24 Week. Rep. 616, as to right of deserted wife to acquire a domicil separate from that of her husband; *Shaw v. Gould*, L. R. 3 H. L. 55, 37 L. J. Ch. N. S. 433, 18 L. T. N. S. 833, 45 L. J. Prob. N. S. 73, L. R. 1 Prob. Div. 139, 34 L. T. N. S. 511, 24 Week. Rep. 616, holding a foreign tribunal has no authority, so far as any consequences in England are concerned, to pronounce a decree of divorce in case of an English marriage between English subjects unless such subjects are, at the time the decree is pronounced, domiciled in the country where the tribunal has jurisdiction; *Andrews v. Andrews*, 176 Mass. 92, 57 N. E. 333; *R. v. Brinkley*, 14 Ont. L. Rep. 434,—as to validity of foreign divorces.

Cited in notes in 19 L.R.A. 516, on validity of foreign divorce decree; 5 Eng. Rul. Cas. 722, on validity of judgment dissolving marriage by court of country where husband is domiciled; 59 L.R.A. 145, 153, on conflict of laws on divorce; 57 L.R.A. 603, on right to contest validity of divorce decree after death of one or both parties.

9 E. R. C. 739, *SOMERVILLE v. SOMERVILLE*, 5 Revised Rep. 155, 5 Ves. Jr. 750.

Domicil.

Cited in *State ex rel. Egan v. Steele*, 33 La. Ann. 910, as to what makes domicil.

—As between two habitations or houses.

Cited in *Burnham v. Rangeley*, 1 Woodb. & M. 7, Fed. Cas. No. 2,176, holding as between two doubtful domiciles evidence showed choice of one; *Boyd v. Beck*, 29 Ala. 703, holding where persons conduct a business at two or more places devoting a portion of their time to each, the intention of such persons, when it can be ascertained, exercises a controlling influence in determining the domicil; *Gilman v. Gilman*, 52 Me. 165, 83 Am. Dec. 502, as to domicil of merchant whose business is in the city and has a country residence; *Harvard College v. Gore*, 5 Pick. 370, holding the original house retained as a summer house and where decedent was taxed was his domicil rather than the town house where he died; *Re High*, 2 Dougl. (Mich.) 515, on the impossibility of two simultaneous domicils and holding on the facts that one who died at sea had changed his chosen to a new domicil; *Woolridge v. McKenna*, 8 Fed. 650; *Greene v. Greene*, 11 Pick. 409,—as to right of man to have two domiciles for some purposes; *State, Potter, Prosecutor, v. Ross*, 23 N. J. L. 517, holding a person

having a fixed domicile in another state, coming into this state for part of the year with his family and servants to reside at a house owned by him here, does not thereby change his domicile, and become an inhabitant of this state: *Isham v. Gibbons*, 1 Bradf. 69, holding domicile was in New Jersey where a permanent residence was taken and kept rather than in New York where the residence also later taken was one of convenience.

—Of children by relation to parents.

Cited in *Harkins v. Arnold*, 46 Ga. 656, holding no change of domicile on part of mother, the natural guardian of the children, could so far change their domicile as to deprive them of their right to homestead in their father's estate; *Williams's Case*, 3 Bland. Ch. 186, as to court not sanctioning change of infant's domicile so as to cast it into a different order of succession; *Bradshaw v. Heath*, 13 Wend. 407, as to son not acquiring a domicile separate from father; *Ryall v. Kennedy*, 8 Jones & S. 347, holding the domicile of an infant follows that of its father, and after the death of the father, that of its mother, in the absence of fraud, until her remarriage; *Beekman v. Beekman*, 53 Fla. 858, 43 So. 923; *Ludlam v. Ludlam*, 26 N. Y. 356, 84 Am. Dec. 193; *Franks v. Hancock*, 1 Posey Unrep. Cas. (Tex.) 554; *Mears v. Sinclair*, 1 W. Va. 185,—holding infant cannot acquire a domicile of his own separate from that of father.

—Of wife.

Cited in *Jackson v. Jackson*, 1 Johns. 424, holding that wife was incapable, during coverture of acquiring domicile distinct from that of her husband.

Evidence and presumption of domicile.

Cited in *Ex parte Cunningham*, L. R. 13 Q. B. Div. 418, 53 L. J. Ch. N. S. 1067, 51 L. T. N. S. 447, 33 Week. Rep. 22, holding mere fact that debtor bears an English name and is an officer in the British Army, does not raise any presumption that his domicile is English as distinguished from Scotch or Irish.

—Continuance till changed.

Referred to as leading case in *Cheever v. Wilson*, 6 D. C. 149, holding established domicile continued for want of proof of change.

Cited with special approval in *Bradley v. Lowry, Speers*, Eq. 1, 39 Am. Dec. 142, holding that the original domicile is presumed to continue, and that change must be affirmatively shown.

Cited in *Wadsworth v. McCord*, 12 Can. S. C. 466, on presumed continuance till new domicile is acquired; *Ennis v. Smith*, 14 How. 400, 14 L. ed. 472, holding burden is on person asserting change to overcome contrary presumption; *Gardner v. Bd. of Edu.* 5 Dak. 259, 38 N. W. 433, holding same and that burden is on person asserting change; *Mitchell v. United States*, 21 Wall. 350, 22 L. ed. 584, 10 Ct. Cl. 120, presuming a continuance where it would have been illegal to choose the alleged new domicile.

—Place of death as evidence.

Cited in *Merrill v. Morrissett*, 76 Ala. 433, refusing to disturb a finding of fact and holding that mere place of death alone is not conclusive in the case of a person of migratory habits.

Requisites of change to new domicile.

Referred to as leading case in *Lowry's Estate*, 6 Pa. Super. Ct. 143, on necessity of adoption of new domicile in fact.

Cited in *Doyle v. Clark*, 1 Flipp. 536, Fed. Cas. No. 4,053, holding there must be an actual change or removal of residence and intention to make such change or removal permanent in order to constitute change of domicile; *Ringgold v.*

Barley, 5 Md. 186, 59 Am. Dec. 107, holding a mere intention to acquire a new domicile without the fact of actual removal avails nothing; *Jennison v. Hapgood*, 10 Pick. 77, holding on facts that no new domicile was acquired and old one continued regardless of intent; *Tunstall v. Walker*, 2 Smedes & M. 638, holding finding against abandonment and substitution in fact was proper; *Moore v. Wilkins*, 10 N. H. 452, holding on the facts no actual choice of new domicile was made at a given time; *Dupuy v. Wurtz*, 53 N. Y. 556, holding domicile not changed though home was let reserving only storage space and though testatrix for years resided in France out of consideration for her health; *Vischer v. Vischer*, 12 Barb. 640, holding a change of domicile requires no length of time and no length of time is sufficient but there must be a bona fide and permanent attempt at change; *Holliman v. Peebles*, 1 Tex. 673, holding a Mexican colonist had acquired no actual Texas domicile though he disavowed original citizenship; *Chaine v. Wilson*, 8 Abb. Pr. 78, 16 How. Pr. 552, holding that person who never had any intention of remaining in state permanently is nonresident thereof, under attachment statute; *Fry's Election Case*, 71 Pa. 302, 10 Am. Rep. 698, 4 Legal Gaz. 225, 29 Phila. Leg. Int. 237 (affirming 8 Phila. 575, 28 Phila. Leg. Int. 223), holding that students residing at a college had no such permanent domicile there as entitled them to vote though they had no intent to return home.

Cited in notes in 40 L.R.A.(N.S.) 989, as to whether domicile is lost by abandonment without intention to return before acquiring new one; 9 E. R. C. 807, on maintenance of original domicile until establishment of new domicile.

—Revival of native or former domicile.

Cited in *First Nat. Bank v. Balcom*, 35 Conn. 351, holding to presumption of continuance and that abandonment of a new domicile does not without intent and fact revive a native domicile within the same nation; *Chaine v. Wilson*, 16 How. Pr. 552, 3 Abb. Pr. 78, holding on the facts there had been a resumption in fact of the original domicile.

—Long absence.

Cited in *Marks v. Marks*, 75 Fed. 321, on effect of temporary absences intending to return; *Chambers v. Prince*, 75 Fed. 176, holding departure to another state to be married there did not abandon domicile though absence continued over a year; *White v. Brown*, 1 Wall. Jr. 217, Fed. Cas. No. 17,538, holding domicile of origin is not lost, for the purposes of succession, by a very long residence abroad and a mere doubt, even very strong doubt of a real intention to return; *Crdwalader v. Howell*, 18 N. J. L. 138, holding the residence required by laws of the state, to entitle a person to vote at an election, means his fixed domicile or permanent home, and is not altered by his occasional absence, with or without his family if it be *animo revertendi*; *Hardy v. De Leon*, 5 Tex. 211, holding absence under national compulsion did not abandon a domicile which was resumed in intent and fact as far as possible; *Gouhenant v. Cockrell*, 20 Tex. 96, holding that a traveling photographer had not lost his claimed domicile by his migratory absence.

Law of owner's domicile as controlling personalty.

Referred to as leading case in *Alexander's Estate*, 3 Clark (Pa.) 87, on rule that personalty follows the domicile.

Cited in *Holecomb v. Phelps*, 16 Conn. 127, holding law of domicile governs but that ancillary order of distribution according to supposed law of domicile was a protection to ancillary representative; *Irving v. McLean*, 4 Blackf. 52; *Carrie's Case*, 2 Bland. Ch. 488; *Schultz v. Pulver*, 11 Wend. 361; *Deconche v. Savetier*, 3 Johns. Ch. 190, 8 Am. Dec. 478; *De Renne's Estate*, 15 Phila. 566, 39 Phila.

Leg. Int. 265, 12 W. N. C. 94; *Hopkins v. Wright*, 17 Tex. 30; *Perry Mfg. Co. v. Brown*, 2 Woodb. & M. 449, Fed. Cas. No. 11,015; *Grant v. Great Western R. Co.* 7 U. C. C. P. 438,—holding estate is administered according to law of place where party is last domiciled; *Saunders v. Williams*, 5 N. H. 213, holding personal estate follows domicile but that bankruptcy does not discharge foreign creditor.

—As to requisites and effect of wills.

Cited in *Trecothick v. Austin*, 4 Mason, 16, Fed. Cas. No. 14,164, holding will passes all personalty wherever found; *Ford v. Ford*, 70 Wis. 19, 5 Am. St. Rep. 117, 33 N. W. 188, holding requisites and effect of will as to personalty governed by law of domicile; *Manuel v. Manuel*, 13 Ohio St. 458; *Moultrie v. Hunt*, 23 N. Y. 394,—on the necessary conformity of a will to the *lex domicilii*; *Manuel v. Manuel*, 13 Ohio St. 458, on law of last domicile as governing essentials of will of personalty.

Power of equity effect distribution of ancillary assets.

Cited in *Harvey v. Richards*, 1 Mason, 381, Fed. Cas. No. 6,184, holding a court of equity has jurisdiction to decree an account and distribution according to the *lex domicilii* of the estate of a deceased person domiciled abroad, which has been collected under an administration granted here.

Administration at place of decedent's death.

Cited in *Leake v. Gilchrist*, 13 N. C. (2 Dev. L.) 73, holding where a decedent has no fixed residence, administration on his estate is properly granted by the courts of the state where he died; *Swatzel v. Arnold*, Woolw. 383, Fed. Cas. No. 13,682, holding ancillary representative accountable to domiciliary one for surplus remaining after paying ancillary debts; *Lawrence v. Kitteridge*, 21 Conn. 577, 56 Am. Dec. 385, holding the assets need not be remitted to the domicile for distribution.

Equity jurisdiction with law courts.

Cited in *Baker v. Biddle*, Baldw. 394, Fed. Cas. No. 764, on concurrent jurisdiction of equity with law.

Jurisdiction to probate wills.

Cited in *Grant v. Great Western R. Co.* 7 U. C. C. P. 438, on probate of wills not having been always ecclesiastical jurisdiction.

9 E. R. C. 764. *BELL v. KENNEDY*, L. R. 1 H. L. Sc. App. Cas. 307.

Domicil.

Cited in *Winans v. Winans*, 205 Mass. 388, 28 L.R.A.(N.S.) 992, 91 N. E. 394, holding that husband and wife lived together in state within meaning of statute regulating divorce where they came into state with intention of making their home there; *Re McElwaine*, 77 Misc. 317, 137 N. Y. Supp. 681, holding that "domicil of origin" is defined as primary domicile of every person subject to common law; *People v. Platt*, 50 Hun. 454, 3 N. Y. Supp. 367, as to distinction between "domicil" and "residence"; *Taney's Appeal*, 38 Phila. Leg. Int. 294, holding that a clear distinction exists between domicile and residence; *Adams v. Adams*, 14 B. C. 301, holding residence alone is not sufficient to give man that status in community indicated by word domicile; *Allen v. Allen*, 15 Ont. Pr. Rep. 458, holding that person appointed to permanent position as collector of customs in new jurisdiction, and who intends to remain there permanently acquires domicile there; *Re Craignish* [1892] 3 Ch. 180, 67 L. T. N. S. 689, holding the domicile of a person is that place or country in which his habitation is fixed without any present intention of removing therefrom; *Wilson v. Wilson*, L. R. 2 Prob. & Div.

435, holding it the relation which the law creates between an individual and a particular locality or country.

Cited in note in 9 Eng. Rul. Cas. 710, on domicile as a permanent home.

— Loss or change.

Cited in *Lowry's Estate*, 6 Pa. Super. Ct. 143, on permanent abandonment alone being sufficient to lose domicile of choice; *Magurn v. Magurn*, 3 Ont. Rep. 570, holding that person who went to United States for sole purpose of getting divorce, and returning here and who procured one, and afterwards returned here, had not changed his domicile; *Re Patience*, L. R. 29 Ch. Div. 976, 54 L. J. Ch. N. S. 897, 52 L. T. N. S. 687, 33 Week. Rep. 501; *Abd-ul-messih v. Farra*, L. R. 13 App. Cas. 431, 57 L. J. P. C. N. S. 88, 59 L. T. N. S. 106, 5 Eng. Rul. Cas. 772; *Winans v. Atty. Gen.* [1904] A. C. 287, 73 L. J. K. B. N. S. 613, 90 L. T. N. S. 721, 20 Times L. R. 510,—holding the domicile of the origin continues unless a fixed and settled intention of abandoning the first domicile and acquiring another as a sole domicile is clearly shown; *Re Marrett*, L. R. 36 Ch. Div. 400, 57 L. T. N. S. 896, 36 Week. Rep. 344, holding in order to lose the domicile of choice and revive the domicile of origin it is not sufficient for the person to form the intention of leaving his domicile of choice but he must actually leave it with the intention of leaving it permanently.

Cited in notes in 40 L.R.A.(N.S.) 989, as to whether domicile is lost by abandonment without intention to return before acquiring new one; 9 E. R. C. 801, 809, on maintenance of original domicile until establishment of new domicile.

Distinguished in *Plant v. Harrison*, 36 Misc. 649, 74 N. Y. Supp. 411, where one day's sojourn with early future purpose of making permanent abode was held not to be a "short residence."

— Subjects resident in colonies or dependencies.

Cited in *Re Tootal*, L. R. 23 Ch. Div. 532, 52 L. J. Ch. N. S. 664, 48 L. T. N. S. 816, 31 Week. Rep. 653, holding British subjects resident in Chinese territory cannot acquire in China a domicile similar to that existing in India and commonly known as Anglo-Indian.

9 E. R. C. 782, *UDNY v. U'DNY*, L. R. 1 H. L. Sc. App. Cas. 441.

Domicil.

Cited in *Marks v. Marks*, 75 Fed. 321, as to distinction between "domicil" and "home"; *Raher v. Raher*, 150 Iowa. 511, 35 L.R.A.(N.S.) 292, 129 N. W. 494, Ann. Cas. 1912D, 680 (dissenting opinion), on civil status of person as dependent upon domicile; *Kapigian v. Minassian*, 212 Mass. 412, 99 N. E. 264, Ann. Cas. 1913D, 535, holding that marriage is a status which is governed by law of domicile of parties; *Adams v. Adams*, 14 B. C. 301, holding that residence alone is not sufficient to give man that status in community indicated by word domicile.

— Continuance and change.

Cited in *Donaldson v. State*, 167 Ind. 553, 78 N. E. 182, holding in doubtful cases the domicile of origin is considered the true one; *Schmoll v. Schenek*, 40 Ind. App. 581, 82 N. E. 805, holding domicile of origin continues until new one is acquired; *Plant v. Harrison*, 36 Misc. 649, 74 N. Y. Supp. 411, holding domicile of choice can be relinquished only *animo et facto*; *Bremme's Estate*, 32 W. N. C. 135, holding that domicile of origin is domicile of person in case no other domicile is found to exist; *State ex rel. Goldsworthy v. Aldrich*, 14 R. I. 171, holding domicile is not changed by mere change of habitancy without an intent to change

the domicile; *Jones v. St. John*, 30 Can. S. C. 122; *Bonbright v. Bonbright*, 1 Ont. L. Rep. 629,—holding that in order to constitute abandonment of domicile of choice there must be two things, abandonment in fact, and intent not to return; *Doucet v. Geoghegan*, L. R. 9 Ch. Div. 441, 26 Week. Rep. 825, holding under facts in case testator abandoned domicile in France and acquired one in England; *Brunel v. Brunel*, L. R. 12 Eq. 298, 25 L. T. N. S. 378, 19 Week. Rep. 970, holding a French subject, by establishing himself in business in England, marrying and continuing to reside here for more than thirty years, making only occasional visits to France, lost the domicile of his origin and acquired one in England; *Douglas v. Douglas*, L. R. 12 Eq. 617, 41 L. J. Ch. N. S. 74, 25 L. T. N. S. 530, 20 Week. Rep. 55, 10 Eng. Rul. Cas. 355, holding the intention required to effect a change of domicile is an intention to settle in a new country as a permanent home, and this is sufficient without any intention to change the civil status.

Cited in notes in 40 L.R.A.(N.S.) 987, as to whether domicile is lost by abandonment without intention to return before acquiring new one; 33 L.R.A.(N.S.) 767, on gaining new residence before abandoning occupation of old by purchasing or hiring property in new locality.

—By choice of party.

Cited in *Harrall v. Harrall*, 39 N. J. Eq. 279, 51 Am. Rep. 17; *People v. Platt*, 50 Hun, 454, 3 N. Y. Supp. 367; *Re Patience*, L. R. 29 Ch. Div. 976, 54 L. J. Ch. N. S. 897, 52 L. T. N. S. 687, 33 Week. Rep. 501; *Re Tootal*, L. R. 23 Ch. Div. 532, 52 L. J. Ch. N. S. 664, 48 L. T. N. S. 916, 31 Week. Rep. 653; *Platt v. Atty. Gen.* L. R. 3 App. Cas. 336, 47 L. J. P. C. N. S. 26, 38 L. T. N. S. 74, 26 Week. Rep. 516; *Haldane v. Eckford*, L. R. 8 Eq. 631, 21 L. T. N. S. 87, 17 Week. Rep. 1059; *Wilson v. Wilson*, L. R. 2 Prob. & Div. 435, 41 L. J. Prob. N. S. 33, 26 L. T. N. S. 108, 20 Week. Rep. 373; *Re Johnson* [1902] 1 Ch. 821, 72 L. J. Ch. N. S. 682, 51 Week. Rep. 444, 88 L. T. N. S. 161, 19 Times L. R. 309; *Abd-ul-Messih v. Farra*, L. R. 13 App. Cas. 431, 57 L. J. P. C. N. S. 88, 59 L. T. 106, 5 Eng. Rul. Cas. 772,—holding domicile from choice is a conclusion or inference which the law denies from the fact of a man fixing voluntarily his sole or chief residence at a particular place with the intention of continuing to reside there for an unlimited time; *Re Grove*, L. R. 40 Ch. Div. 216, 58 L. J. Ch. N. S. 57, 59 L. T. N. S. 587, 37 Week. Rep. 1, holding in order to establish a new domicile it was necessary for party to take up residence there for period not limited by time.

—Revival of original domicile after change.

Cited in *Bremme's Estate*, 2 Pa. Dist. R. 455, 13 Pa. Co. Ct. 177; *Bradford v. Young*, L. R. 26 Ch. Div. 656, 54 L. J. Ch. N. S. 96, 50 L. T. N. S. 707, 32 Week. Rep. 901; *King v. Foxwell*, L. R. 3 Ch. Div. 518, 45 L. J. Ch. N. S. 693, 24 Week. Rep. 629,—holding the domicile of choice may be abandoned without acquiring a new domicile of choice, and in such a case the domicile of origin reverts.

—In respect to capacity of succession or inheritance.

Cited in *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321, holding the status of any person, within inherent capacity of succession or inheritance, is to be ascertained by law of domicile which created the status.

—Of wife.

Cited in *Reed's Will*, 48 Or. 500, 9 L.R.A.(N.S.) 1159, 87 Pac. 763, holding that woman does not effect change of domicile, so as to deprive probate court of her former state of residence of jurisdiction of her estate by removing with husband into another state for his health.

— Of child.

Cited in *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456, holding that child born in United States of parents of Chinese descent, who are subjects of emperor of China, but who reside permanently in United States, becomes at birth citizen of United States; *Re Goodman*, L. R. 17 Ch. Div. 266, 50 L. J. Ch. N. S. 425, 44 L. T. N. S. 527, 29 Week. Rep. 586 (dissenting opinion), as to status of child depending upon domicile of father; *Firebrace v. Firebrace*, L. R. 4 Prob. Div. 63, 47 L. J. Prob. N. S. 41, 39 L. T. N. S. 94, 26 Week. Rep. 617, as to domicile of father being domicile of child; *Woodward v. Woodward*, 87 Tenn. 644, 11 S. W. 892, holding that domicile of minor orphan child, who has been adopted under laws of this state, is that of adoptive parent with whom it resides.

Cited in notes in 65 L.R.A. 184, on conflict of laws as to legitimacy; 5 Eng. Rul. Cas. 761, on law governing status of legitimacy.

— Question of fact.

Cited in *Dupuy v. Wurtz*, 53 N. Y. 556, holding question of intention of change of domicile one of fact.

— Burden of proof.

Cited in *Huntley v. Baker*, 33 Hun. 578, holding burden of proof of showing change of domicile upon him who alleges same; *Winans v. Atty.-Gen.* [1904] A. C. 287, 73 L. J. K. B. N. S. 613, 90 L. T. N. S. 721, 20 Times L. R. 510 (reversing 65 J. P. S. 83 L. T. N. S. 634, 17 Times L. R. 94), holding the onus of proving that a domicile has been chosen in substitution for the domicile of origin lies upon those who assert that the domicile of the origin has been lost.

Capacity to change domicile.

Cited in *Hamilton v. Dallas*, L. R. 1 Ch. Div. 257, 45 L. J. Ch. N. S. 15, 33 L. T. N. S. 495, 24 Week. Rep. 264, holding a peer of the British Parliament is not, by reason of his obligation to attend the House of Peers whenever his presence there is required, incapacitated from acquiring a domicile in a foreign country.

9 E. R. C. 811, *WARD v. TURNER*, 2 Ves. Sr. 431, Dick. 170.

Delivery as requisite to validity of gift.

Cited in *Connor v. Trawick*, 37 Ala. 289, 79 Am. Dec. 58, holding at common law, in the absence of an actual delivery of the property itself, a gift could only be consummated by deed or other instrument under seal; *Hatcher v. Buford*, 60 Ark. 169, 27 L.R.A. 507, 29 S. W. 641; *Hynson v. Terry*, 1 Ark. 83; *Huntington v. Gilmore*, 14 Barb. 243; *McDowell v. Murdock*, 1 Nott. & McC. 237, 9 Am. Dec. 684; *Dickeschied v. Exchange Bank*, 28 W. Va. 340,—holding delivery essential; *Cranson v. Cranson*, 4 Mich. 230, 66 Am. Dec. 534, holding that delivery of property mentioned in bill of sale shortly before death of vendor, whether transaction was gift or sale, rendered transaction valid; *Noble v. Smith*, 2 Johns. 52, holding that to make valid gift there must be immediate possession of the thing delivered to donee; *Adams v. Hayes*, 24 N. C. (3 Ired. L.) 361, holding that to constitute gift of personalty some act is required by which possession of thing delivered shall be transferred from donor to donee; *Miller v. Anderson*, 4 Rich. Eq. 1, holding that there cannot be valid gift, by parol of slave, to take effect at donor's death, although form of an actual delivery be gone through with; *Jaggers v. Estes*, 3 Strohn. Eq. 379, holding that whenever an effectual means of controlling personal property is conferred by its owner on another person, that is valid de-

livery of the property; *Ewing v. Ewing*, 2 Leigh, 337, holding a verbal gift of chattel, without any actual delivery, does not pass the property to donee.

Cited in *Gray*, Perpet. 2d ed. 62, on invalidity of parol gift of chattel to be without delivery.

— Actual or symbolical.

Cited in *Coleman v. Parker*, 114 Mass. 30, holding that gift of trunk and contents is not made by person in last illness by delivering key and expressing desire to give trunk and contents, where key is returned to owner at his request; *Foley v. Harrison*, 233 Mo. 460, 136 S. W. 354, holding that there may be valid gift causa mortis of choses in action and money locked up in box of safety deposit vault, by delivery of key to box, and words giving donee all contents; *Tarbox v. Grant*, 56 N. J. Eq. 199, 39 Atl. 378, holding that gift of chattels or choses in action by deed is complete and valid by delivery of deed alone; *Wilson v. Featherston*, 122 N. C. 747, 30 S. E. 325, holding actual delivery necessary except where such delivery is impossible or impracticable; *Lavender v. Pritchard*, 3 N. C. (2 Hayw.) 337, holding symbolical delivery of chattels is good, when the things given are not present to be delivered; *Re Harcourt*, 31 Week. Rep. 578, holding a clear intention on part of donor to give, acted upon by donee, constitutes a valid gift inter vivos without actual delivery; *Whalen v. Milholland*, 89 Md. 199, 44 L.R.A. 208, 43 Atl. 45, holding that gift of savings bank deposit is made by delivery of pass book from donor to donee, describing them as joint owners, and making money payable to order of either.

Cited in *Benjamin*, Sales, 5th ed. 741, on symbolical delivery of goods divesting seller's possession and lien.

— Gift of bonds or written obligations.

Cited in *Pennington v. Gittings*, 2 Gill & J. 208, holding that gift by father to child of certificate that father is entitled to certain number of shares of capital stock in bank "transferable at bank only personally" or by attorney, did not constitute valid gift; *Bradley v. Hunt*, 5 Gill & J. 54, 23 Am. Dec. 597, holding that bank notes, and promissory notes, payable to bearer, pass by delivery, and constitute valid donations when delivered; *Grover v. Grover*, 24 Pick. 261, 35 Am. Dec. 319, holding that valid gift may be made, inter vivos, of promissory note payable to order of donor, without indorsement by him or other writing; *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054, holding that actual delivery of negotiable bonds with words or acts indicating present absolute gift, constitutes valid gift inter vivos; *Smith v. Smith*, 5 Pa. 254, holding that bonds left by decedent, without delivery, may be enforced, even where there were no testamentary directions to deliver them; *Talbot v. Talbot*, 32 R. I. 72, 78 Atl. 535, Ann. Cas. 1912C, 1221, holding that delivery of certificates of stock with written assignment, but without indorsement or registration, constitutes valid gift; *Elam v. Keen*, 4 Leigh, 333, holding where owner of a bond which was in suit, and for which the owner held an attorney's receipt, told plaintiff that he might have the bond, and delivered him the attorney's receipt for it, it was a valid gift of bond.

Gifts causa mortis.

Cited in *Noble v. Garden*, 146 Cal. 225, 79 Pac. 883, 2 Ann. Cas. 1001, as to origin of such gift; *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 884, 44 S. E. 721, holding that gift causa mortis will not be defeated because accompanied by words "if I die, or any thing happen to me."

Cited in notes in 27 L. ed. U. S. 500, on gifts causa mortis; 9 Eng. Rul. Cas. 860, 862-865, on requisites of donatio causa mortis.

Cited in Benjamin, Sales, 5th ed. 853, on doctrine of gift causa mortis; Smith, Pers. Prop. 130, on nature of gifts causa mortis.

— Obligations and choses in action.

Cited in *Brown v. Brown*, 18 Conn. 410, 46 Am. Dec. 328, holding promissory note of a third person not payable to bearer, nor so indorsed as to transfer the legal title by delivery merely may be subject of gift, but rejecting reasoning of cited case; *Parish v. Stone*, 14 Pick. 198, 25 Am. Dec. 378, holding that donor's own promissory note, payable to donee, cannot be subject of gift causa mortis; *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425, 37 Am. Rep. 371, holding deposit in a savings bank may be subject of; *Leyson v. Davis*, 17 Mont. 220, 31 L.R.A. 429, 42 Pac. 775, holding that certificates of stock in bank are sufficiently delivered to maintain gift causa mortis, when handed to donee, with words indicating gift in case of death, spoken on eve of departure on trip which was but desperate fight for life; *Harris v. Clark*, 2 Barb. 94, holding promissory notes and bills of exchange, whether payable to order or not, and whether indorsed or not, bonds and mortgages, and all instruments in writing by which any debt against a third person is secured, may be subject of gift; *Hall v. Howard, Rice*, L. 310, 33 Am. Dec. 115, holding that delivery of donor's own note without consideration payable at his death creates no liability and is unenforceable as gift causa mortis; *Priester v. Priester*, Rich. Eq. Cas. 26, 23 Am. Dec. 191, holding that notes by father to his sons, to be delivered to them after his death for purpose of equalizing advancements made to them, are void; *Lee v. Boak*, 11 Gratt. 182, holding bond may be subject of; *Foster v. Walker*, 32 N. S. 156, holding that delivery of notes enclosed in envelope to third person to be delivered by him to donee, after donor's death, was insufficient to create gift causa mortis; *Ward v. Bradley*, 1 Ont. L. Rep. 118, holding that handing mortgages to defendant, telling her that they were for her, and that he would execute assignment of them to her, was not sufficient to create gift causa mortis, no assignment having been executed; *Moore v. Moore*, L. R. 18 Eq. 474, 43 L. J. Ch. N. S. 617, 30 L. T. N. S. 752, 22 Week. Rep. 729, as to stock subject to valid gift causa mortis.

Cited in 2 Morse, Banks, 4th ed. 1021, on title to bank book under gift causa mortis.

— Last illness and imminence of death.

Cited in *Robson v. Robson*, 3 Del. Ch. 51; *Walden v. Dixon*, 5 T. B. Mon. (Ky.) 170; *Dole v. Lincoln*, 31 Me. 422,—holding that to constitute gift causa mortis, gift must be made in contemplation of near approach of death, and to take effect absolutely, only upon death of donor; *Walsh's Appeal*, 122 Pa. 177, 1 L.R.A. 535, 9 Am. St. Rep. 83, 15 Atl. 470, holding that gift causa mortis is not created where depositor during his last illness delivered her savings bank book to third person, saying that if she died, money was for her sister in Ireland; *Adams v. Nicholas*, 1 Miles (Pa.) 90, holding donor must be in peril of death.

— Necessity of delivery.

Cited in *Brinekerhoff v. Lawrence*, 2 Sandf. Ch. 400; *Delmotte v. Taylor*, 1 Redf. 417,—holding delivery necessary; *Egerton v. Egerton*, 17 N. J. Eq. 419; *Scott v. Union & Planter's Bank & T. Co.*, 123 Tenn. 258, 130 S. W. 757,—holding that delivery, either actual or constructive, of thing given, is essential to validity of gift causa mortis; *Gilmore v. Whitesides*, Dud. Eq. 11, 31 Am. Dec. 563, holding that to constitute a gift causa mortis by deed, delivery of deed must be made; *McKinnon v. McKinnon*, 28 N. S. 189, on delivery as essential requisite to gift causa mortis although thing is in possession of donee.

— Sufficiency of delivery.

Cited in *Keepers v. Fidelity Title & D. Co.* 56 N. J. L. 392, 23 L.R.A. 184, 44 Am. St. Rep. 397, 28 Atl. 585, holding that delivery of key to box saying "I give you the box and all it contains" was not sufficient delivery of securities contained in box, where box was in another room locked in trunk; *Crymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313, holding that absolute assignment of twenty shares of stock included in one certificate for 120 shares, and delivery of assignment to wife to be given to plaintiff at donor's death constituted sufficient delivery; *Apache State Bank v. Daniels*, 32 Okla. 121, 40 L.R.A.(N.S.) 901, 121 Pac. 237, holding that delivery of key to box containing securities with words "I give you all of my bank stock" was not sufficient delivery to constitute gift causa mortis; *Wells v. Tucker*, 3 Binn. 366, holding the delivery of a bond or personal chattel by the owner in his last illness to his wife for use of a third person is a sufficient delivery; *Thomas v. Lewis* (*Page v. Lewis*) 89 Va. 1, 18 L.R.A. 170, 37 Am. St. Rep. 848, 15 S. E. 389, holding constructive delivery sufficient when actual manual delivery is either impracticable or inconvenient; *Yancey v. Field*, 85 Va. 756, 8 S. E. 721, holding to render gift effectual, the thing given, or the means of obtaining it, must be delivered by donor to donee or to his agent, and accepted by him; *Claytor v. Pierson*, 55 W. Va. 167, 46 S. E. 935, holding delivery of receipt for money in possession of another sufficient; *Hall v. Hall*, 20 Ont. Rep. 684 (reversing 20 Ont. Rep. 168), holding that delivery of keys of cash box, which was in possession of donor's solicitor was insufficient to create gift causa mortis; *Travis v. Travis*, 12 Ont. App. Rep. 438, holding that delivery of key to drawer in which mortgage was kept was not sufficient to create gift causa mortis; *Young v. Derenzy*, 26 Grant. Ch. (U. C.) 509, holding that delivery of key to cash box containing promissory note was insufficient to create gift causa mortis; *McCabe v. Robertson*, 18 U. C. C. P. 471, holding that delivery of key of trunk containing bank deposit receipt, was insufficient to create gift causa mortis; *McDonald v. McDonald*, 33 Can. S. C. 145, holding that delivery of deposit receipt together with checks for amount of deposit less some interest, was sufficient delivery to create gift causa mortis.

Cited in note in 18 L.R.A. 171, on sufficiency of constructive delivery to sustain gift causa mortis.

— Revocability.

Cited in *Merchant v. Merchant*, 2 Bradf. 432, holding it revocable at option of donor.

Cited in *Smith*, Pers. Prop. 133, on effect of power of revocation of gift causa mortis.

Impolicy of gifts causa mortis resting in parol.

Cited in *Tyrell's Estate*, 3 Pa. Co. Ct. 228, 19 W. N. C. 334, 44 Phila. Leg. Int. 146, on the evil tendencies of gifts causa mortis resting in parol.

Liability of gifts causa mortis for debts.

Cited in *Bloomer v. Bloomer*, 2 Bradf. 339, holding that gifts causa mortis are subject to debts and are contingent on death.

Proof of gift.

Cited in *Scott v. Riley*, 49 Mo. App. 251, to the point that gift causa mortis must be established by clear evidence; *Seabright v. Seabright*, 28 W. Va. 412, holding that court will require most satisfactory proof of gift as well as of delivery of thing, when gift is a large amount and nearly whole of donor's personal estate; *Thomas v. Lewis* (*Page v. Lewis*) 89 Va. 1, 18 L.R.A. 170,

37 Am. St. Rep. 848, 15 S. E. 389, holding that one competent witness, is sufficient to establish gift causa mortis.

— Relevancy of declarations of donor to show intention to make gift.

Cited in *Smith v. Burnet*, 35 N. J. Eq. 314, holding that evidence of declarations of alleged donor at time of transfer of personal property is relevant to show whether gift, bailment or trust was intended.

Sufficiency of delivery of goods as collateral for loan to prevent attachment by third persons.

Cited in *Union Trust Co. v. Wilson*, 198 U. S. 530, 49 L. ed. 1154, 25 Sup. Ct. Rep. 766, holding that indorsement to third person, as security for loan, of warehouse receipt for goods in storage is sufficient delivery of goods against attachment by creditors.

Aid of equity to perfect gift.

Cited in *Taylor v. Staples*, 8 R. I. 170, 5 Am. Rep. 556, 94 Am. Dec. 126, holding that equity will not enforce a voluntary agreement or perfect a merely promised or imperfect gift.

Testamentary instrument or gifts.

Cited in *Welch v. Kinard*, Speers, Eq. 256, as to when a will exists or was attempted; *McGee v. McCants*, 1 McCord, L. 517, as to proof of intention of testator by parol in doubtful cases; *Milledge v. Lamar*, 4 Desauss. Eq. 697, on what constitutes a testamentary paper; *Lyles v. Lyles*, 2 Nott. & McC. 531, holding that no particular form is required for will, and question whether paper is will depends upon intention.

Fraud as question for jury.

Cited in *Rutherford v. Williams*, 42 Mo. 18, holding that question of fact whether certain promises were fraudulently given, and were sole grounds of plaintiff's action, to his injury should be left to jury.

Heir as party to action or suit.

Cited in *Caldwell v. Taggart*, 4 Pet. 190, 7 L. ed. 328, on making heir a party to give undoubted title at judicial sale.

9 E. R. C. 827, *DUFFIELD v. ELWES*, 1 Bligh, N. R. 497, 1 Dow. & Cl. 1, 24

Revised Rep. 173, 30 Revised Rep. 69, reversing in part the decision of the Vice Chancellor, reported in 1 L. J. Ch. 213, 1 Sim. & Stu. 239.

Cited in *Ahrend v. Adiorne*, 118 Mass. 261, 19 Am. Rep. 449, as to certain book of reports being of no high character.

Delivery essential to gift causa mortis.

Cited in *Robson v. Robson*, 3 Del. Ch. 51, holding there was not sufficient delivery to constitute good gift; *Rupert v. Johnston*, 40 U. C. Q. B. 11, holding delivery essential; *Thomas v. Lewis* (*Page v. Lewis*) 89 Va. 1, 18 L.R.A. 170, 37 Am. St. Rep. 848, 15 S. E. 389 (dissenting opinion), on sufficiency of delivery to constitute valid gift causa mortis; *Thompson v. Heffernan*, 4 Drury & War. 285, holding it necessary that subject of gift be delivered at the time.

— Gifts of money contracts or documents of right.

Cited in *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425, 37 Am. Rep. 371, holding delivery of savings bank book passes title to money in bank; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313, holding delivery of stock without transfer or books sufficient; *Apache State Bank v. Daniels*, 32 Okla. 121, 40 L.R.A.(N.S.) 901, 121 Pac. 237, holding that delivery of key to box containing securities with words, "I give you all my bank stock" was not sufficient delivery

to constitute gift causa mortis; *Tillinghast v. Wheaton*, 8 R. I. 536, 5 Am. Rep. 621, 94 Am. Dec. 126, holding the delivery of a savings bank pass-book containing the entries by the officers of the bank of moneys deposited by a deceased wife with a parol gift of the same by surviving husband when in extremis valid gift causa mortis of money deposited in bank; *Randall v. Peckham*, 11 R. I. 600, holding to make a valid gift causa mortis of a chose in action by delivery of some document relating to it, the document must be essential to its recovery; *Tyrrell's Estate*, 3 Pa. Co. Ct. 228, 19 W. N. C. 334, 44 Phila. Leg. Int. 146, holding money deposited in a savings bank will pass by gift causa mortis upon delivery to donees or to some one for him of the deposit book with apt words expressive of the intent; *Van Dyke v. Grand Trunk R. Co.* 84 Vt. 212, 78 Atl. 958, Ann. Cas. 1913A, 640, to the point that mortgage could be subject of gift causa mortis; *McCabe v. Robertson*, 18 U. C. C. P. 471, holding there was no sufficient delivery of deposit receipt to constitute gift; *Lee v. Bank of British N. A.* 30 U. C. C. P. 255, holding that endorsement of deposit receipt without any proof that title to same was intended to be passed, does not show gift causa mortis.

Distinguished in *McGonnell v. Murray, Jr.* Rep. 3 Eq. 460, holding delivery of the book of a depositor in savings bank not a sufficient delivery to constitute a donation of the money deposited.

The decision of the Vice Chancellor was cited in *Foley v. Harrison*, 233 Mo. 460, 136 S. W. 354, holding that there may be gift causa mortis of choses in action and money locked up in box of safety deposit vault by delivery of key to box, and words giving donee contents of box.

The decision of the Vice Chancellor was distinguished in *Bradley v. Hunt*, 5 Gill & J. 54, 23 Am. Dec. 597, holding a promissory note payable to a payee or order is not the subject of a gift causa mortis, by mere parol.

—Delivery through intermediary.

Cited in *Leahy v. O'Keefe*, N. F. (1884-96) 527, holding that delivery of deposit receipt to sister, saying what money is in that note was his sister's and her husband's, alleged donees, did not create gift causa mortis; *Travis v. Travis*, 12 Ont. App. Rep. 438, holding delivery to person as agent for donor with instructions to deliver property to donee not valid as gift causa mortis.

—Similarity to gifts inter vivos in matter of delivery.

Cited in *Re Murray*, 9 Ont. App. Rep. 369; *Hopkins v. Manchester*, 16 R. I. 663, 7 L.R.A. 387, 19 Atl. 243,—as to there being no distinction in regard to delivery between gift causa mortis and inter vivos; *Haekney v. Vrooman*, 62 Barb. 650, holding whether a gift of a bond and mortgage be inter vivos or causa mortis the donee acquires a legal as well as equitable title by mere delivery without writing.

Distinguished in *Staniland v. Willott*, 3 Maen. & G. 664, holding the presence of a delivery sufficient for gift inter vivos does not necessarily rebut gift causa mortis.

Gifts causa mortis.

Cited in *Grattan v. Appleton*, 3 Story. 755, Fed. Cas. No. 5,707; *Lee v. Luther*, 3 Woodb. & M. 519, Fed. Cas. No. 8,196; *Adams v. Nicholas*, 1 Miles (Pa.) 90,—holding it must be made in contemplation of approach of death; *Thomas v. Lewis (Page v. Lewis)*, 89 Va. 1, 18 L.R.A. 170, 37 Am. St. Rep. 848, 15 S. E. 389 (dissenting opinion), on impolicy of gifts causa mortis resting in parol; *Meach v. Meach*, 24 Vt. 591, holding a gift of all the donor's personal property in prospect of death, valid gift causa mortis; *Agnew v. Beliaist Bkg. Co.* [1896] 2 Ir. Q. B. 204, as to essentials of such gifts.

Cited in notes in 9 Eng. Rul. Cas. 862, 863, 866, 867, on requisites of *donatio causa mortis*; 27 L. ed. U. S. 500, on gifts *causa mortis*.

Cited in Smith Pers. Prop. 134, on gifts *causa mortis* as not favored in law.

The decision of the Vice-Chancellor was cited in *Adams v. Nicholas*, 1 Miles (Pa.) 90, holding that will duly executed and proved after gift *causa mortis* was attempted to be made is conclusive evidence against validity of such gift.

Choses in action subject to gift causa mortis.

Referred to as leading case in *Leyson v. Davis*, 17 Mont. 220, 31 L.R.A. 429, 42 Pac. 775, holding gift of national bank stock certificates by delivery alone was good.

Cited in *Travelers' Ins. Co. v. Grant*, 54 N. J. Eq. 208, holding a policy of life insurance payable to "the legal representatives of the assured" may be subject of; *Waterloo v. DeWitt*, 36 N. Y. 340, 93 Am. Dec. 517, holding certificate of deposit passed by mere delivery; *Harris v. Clark*, 2 Barb. 94, holding drawer's gift of a draft by delivery alone was good and enforceable in name of executor's against drawee; *Westerlo v. DeWitt*, 35 Barb. 215 (dissenting opinion), as to bonds and mortgages being subject of; *Kill v. Weaver*, 94 N. C. 274, 55 Am. Rep. 601, holding mortgage bonds payable to order and not indorsed, may be given as *donationes causa mortis*, and donee may sue on them in his own name and mortgage goes with the bond; *Thomas v. Lewis* (*Page v. Lewis*), 89 Va. 1, 18 L.R.A. 170, 37 Am. St. Rep. 848, 15 S. E. 389, holding all species of personalty may be given *mortis causa*; *Seabright v. Seabright*, 28 W. Va. 412, on former English rule now changed that a note payable to donor could not be given; *McDonald v. McDonald*, 33 Can. (S. C.) 145; *Porter v. Walsh* [1895] 1 Ir. Ch. 284.—holding deposit receipt undorsed good subject-matter of gift; *Re Dillon*, L. R. 44 Ch. Div. 76, 59 L. J. Ch. N. S. 420, 62 L. T. N. S. 614, 38 Week. Rep. 369, holding banker's deposit not indorsed by donor valid gift *causa mortis*; *Cassidy v. Belfast Bkg. Co.* Ir. L. R. 22 C. L. 68, holding a deposit receipt in the ordinary form used by banks may be subject of gift *causa mortis* although the receipt is expressed to be not transferable; *Veal v. Veal*, 29 L. J. Ch. N. S. 321, 27 Beav. 303, 6 Jur. N. S. 527, 2 L. T. N. S. 228, 8 Week. Rep. 2, holding promissory note not indorsed is subject of gift; *Re Beaumont* [1902] 1 Ch. 889, 71 L. J. Ch. N. S. 478, 86 L. T. N. S. 410, 50 Week. Rep. 389, holding gift of check drawn by deceased not valid gift *causa mortis*.

Distinguished in *Parish v. Stone*, 14 Pick. 198, 25 Am. Dec. 378, holding donor's own promissory note payable to donee cannot be subject of; *Duckworth v. Lee* [1899] 1 Ir. Ch. 405, holding an "I O U" cannot be the subject of gift.

Gifts inter vivos.

Cited in *Grover v. Grover*, 24 Pick. 261, 35 Am. Dec. 319, holding valid gift may be made of a promissory note payable to order of donor without indorsement by him or other writing; *Donnell v. Wylie*, 85 Me. 143, 26 Atl. 1092, holding mortgages may be transferred by delivery; *Hamor's Estate*, 1 Chester Co. Rep. 319, on deed of trust being ineffectual because of want of delivery of securities; *Streeper v. Zimmerman*, 5 Legal Gaz. 126, on necessity of delivery of possession of chattel in order to constitute a valid gift; *Talbot v. Talbot*, 32 R. I. 72, 78 Atl. 535, Ann. Cas. 1912C, 1221, holding that delivery of certificates of corporate stock with written assignment, but without indorsement or registration, constitutes valid gift; *Carpenter v. Dodge*, 20 Vt. 595, holding that mere agreement to give, for consideration of love and affection, neither transfers property to donee, nor gives him right to compel completion of contract.

Cited in notes in 12 E. R. C. 429, and 12 E. R. C. 431, on necessity of delivering gift *inter vivos*.

Questioned in *Walsh's Appeal*, 122 Pa. 177, 1 L.R.A. 535, 9 Am. St. Rep. 83, 15 Atl. 470, 22 W. N. C. 258, 19 Pittsb. L. J. N. S. 212, holding bare manual delivery of bank book requiring judicial action to complete the transfer of title was not good.

The decision of the Vice-Chancellor was cited in *Rupert v. Johnston*, 40 U. C. Q. B. 11, holding that promissory note of donor payable to donee, which donor handed to donee to look at and then took it back, could not be claimed as gift by alleged donee.

Equitable execution of defective gift.

Cited in *Brown v. Brown*, 18 Conn. 410, 46 Am. Dec. 328, holding delivery alone is an equitable transfer enforceable as such; *Yard v. Patton*, 13 Pa. 78, as to court of equity refusing to interfere to execute.

Interference of equity to relieve against condition unperformed.

Cited in *Wells v. Smith*, 2 Edw. Ch. 78; *Labelle v. O'Connor*, 15 Ont. L. Rep. 519, —as to when equity will interfere.

Cited in note in 69 L.R.A. 863, on equitable relief against forfeiture of estate.

Sufficiency of transfer of mortgage.

Cited in *Morrow v. Souder*, 3 Phila. 112, 15 Phila. Leg. Int. 132, holding that mortgage may be transferred without any writing.

Proof of intention of parties as to conveyance, absolute in form.

Cited in *Green-shields v. Barnhart*, C. R. 2 A. C. 91 (affirming 3 Grant, Ch. (U. C.) 1), on establishing by facts not purely oral that a conveyance of land absolute in form is intended as security.

Effect of assignment of portion of mortgage security.

Cited in *McLellan v. Maitland*, 3 Grant, Ch. (U. C.) 164, holding that assignment of portion of mortgage security, had effect of transferring portion of mortgage debt proportioned to value of estate, and in that proportion entitled assignee to benefit of securities.

Presumption of administration of estate.

The decision of the Vice-Chancellor was cited in *Gardner v. Cumming*, Ga. Dec. p. 1, holding that after lapse of 20 years it will not be presumed from mere receipt of Register of Probates for his fees that there was administration of decedent's estate.

9 E. R. C. 868, *MURRAY v. ELLISTON*, 5 Barn. & Ald. 657, 1 Dowl. & R. 299, 24 Revised Rep. 519.

Copyright against dramatization.

Cited in *Keene v. Kimball*, 16 Gray, 545, 77 Am. Dec. 426, holding the representation of a dramatic work, which the proprietor has no copyright of and has previously caused to be represented and exhibited for money, is no violation of any right of property although made without license of the proprietor; *Palmer v. De Witt*, 47 N. Y. 532, 7 Am. Rep. 480; *Keene v. Wheatley*, 5 Clark (Pa.) 501, Fed. Cas. No. 7,644, holding a legislative enactment securing generally to literary proprietors a copyright for a limited period, but containing no special provision as to theatrical representation does not, in case of a dramatic literary corporation, include the sole right of such representative.

Cited in notes in 51 L.R.A. 378, on common-law right of authors and others in intellectual productions; 2 Brit. Rul. Cas. 111, on infringement of dramatic copyright; 18 E. R. C. 596, on new arrangement of a musical composition as an independent work.

Cited in *Drone Copyr.* 556, as to owner's common-law rights being lost by public

performance of manuscript drama; Drone Copyr. 591, on meaning to be given to dramatic composition as used in copyright statute; Drone Copyr. 475, on non-availability of common law remedies for infringement of copyright; Drone Copyr. 286, on statutory requisites of copyright on dramatic compositions.

Distinguished in *Warne & Co. v. Seebohm*, L. R. 39 Ch. Div. 73, 57 L. J. Ch. N. S. 689, 58 L. T. N. S. 928, 36 Week. Rep. 686, 9 Eng. Rul. Cas. 879, holding it for purpose of dramatization one prints or otherwise multiplies copies of a book he violates the rights of the author; *Chappell v. Boosey*, L. R. 21 Ch. Div. 232, 51 L. J. Ch. N. S. 625, 46 L. T. N. S. 854, 30 Week. Rep. 733, 9 Eng. Rul. Cas. 890, holding under statute the publication in this country of a dramatic piece, or musical composition, as a book before it has been publicly represented or performed does not deprive the author, or his assignee, of the exclusive right of representing or performing it.

Questioned in *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480, holding the representation of a dramatic work, which the proprietor has never caused to be printed and has not obtained a copyright of, if made without license of the proprietor, is a violation of his right and may be restrained by injunction.

9 E. R. C. 871, *TOOLE v. YOUNG*, 43 L. J. Q. B. N. S. 170, L. R. 9 Q. B. 523, 30 L. T. N. S. 599, 22 Week. Rep. 694.

Copyright of drama.

Cited in *The Iolanthe Case*, 15 Fed. 439, as to infringement of right of public performance by a substantially identical composition derived by independent labor.

Cited in Drone Copyr. 457, 458, 460, 461, on dramatization of copyrighted work as piracy; Macgillivray Copyr. 114, on right to fair use of prior copyrighted work on subject in which there are common sources of information; Macgillivray Copyr. 120, 122, on nature of performing rights within copyright law; Macgillivray Copyr. 123, 126, as to what is a dramatic work.

9 E. R. C. 879, *WARNE v. SEEBOHM*, L. R. 39 Ch. Div. 73, 57 L. J. Ch. N. S. 689, 58 L. T. N. S. 928, 36 Week. Rep. 686.

Infringement of copyright.

Cited in note in 7 Eng. Rul. Cas. 98, on abridgement of larger work as a non-infringement of copyright.

Cited in Macgillivray Copyr. 90, 97, 113, 114, on what is a piratical copy of a copyrighted work; Macgillivray Copyr. 123, as to what is a dramatic work; Macgillivray Copyr. 120, on nature of performing rights within copyright law.

9 E. R. C. 890, *CHAPPELL v. BOOSEY*, L. R. 21 Ch. Div. 232, 51 L. J. Ch. N. S. 625, 46 L. T. N. S. 865, 30 Week. Rep. 733.

Rights of author.

Cited in 2 Cooley Torts 3d ed. 714, on rights in literary and artistic productions after publication.

9 E. R. C. 900, *EX PARTE HUTCHINS & ROMER*, 48 L. J. Q. B. N. S. 505, 41 L. T. N. S. 144, L. R. 4 Q. B. Div. 483, 27 Week. Rep. 857, affirming the decision of the Queen's Bench Division, reported in 48 L. J. Q. B. N. S. 29, L. R. 4 Q. B. Div. 90, 39 L. T. N. S. 396, 27 Week. Rep. 261.

Copyright.

Cited in note in 7 E. R. C. 132, on existence of copyright independently of registration.

Cited in Macgillivray Copyr. 135, on assignment of performing rights.

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